No. 89-1576



IN THE

# Supreme Court of the United States

October Term, 1989

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THE TRAVELERS INDEMNITY COMPANY,

*Petitioner,*

v.

AVONDALE INDUSTRIES, INC. and OGDEN CORPORATION,

*Respondents,*

- and -

COMMERCIAL UNION INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Whether a district court may invoke Rule 54(b) of the Federal Rules of Civil Procedure to certify as "final" and appealable its ruling on certain aspects of a claim when a full and final resolution of that claim necessarily depends upon an adjudication of rights and obligations at issue in a third party action?

2. Whether the district court sitting in diversity transgressed the institutional limits on its discretion by certifying for immediate appeal a partial summary judgment that (i) conflicted with a recent ruling of the forum state's intermediate level appellate court; and (ii) involved important and controversial issues of state law awaiting review by that state's highest court?

## Rule 29.1 Statement

The parent company of Petitioner The Travelers Indemnity Company is The Travelers Corporation. The Travelers Corporation owns an interest in the following subsidiaries (excluding wholly owned subsidiaries):

| Company Name | % Ownership |
|---|---|
| Applied Expert Systems, Inc. | 27.5 % |
| La Metropole S.A. | 98.83 % |
| ATALFA (UK) | 23.5 % |
| Dillon, Read Limited | 50.0 % |
| London & Hartford Corp. | 50.0 % |
| Resource Information Management Systems | 20.0 % |

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As of March, 1989, there were 30,844 hazardous waste sites in the Environmental Protection Agency ("EPA") information system. Some estimates place the total private and governmental cost of cleanup at $500 billion. J. Acton, *Understanding Superfund, A Progress Report*, Inst. Civ. Just. 1-2, 61 (1989). The potential liabilities of the owners of these sites and the generators and transporters of the wastes which fill them have created a major litigation theater that is consuming enormous judicial resources.

There are now hundreds of pending pollution liability insurance coverage disputes in which federal district courts are called upon to interpret and apply the substantive insurance law of the several states. Because of strong differences of opinion concern-

ing both environmental policy and the scope of coverage for polluting conduct and cleanup costs, a number of federal courts have declined to follow intermediate level state appellate decisions and have freely disagreed with one another on the substantive law of a particular state.

This case arises from the certification of a partial summary judgment declaring that one of five insurers that provided liability insurance coverage to Respondent policyholders had a duty to defend pollution claims. The United States District Court for the Southern District of New York entered a partial summary judgment against Petitioner without addressing the interrelated defense obligations of the other insurers. The district court wrote large on controversial and unresolved issues of New York law, while rejecting a recent intermediate level appellate decision, the most reliable statement of New York law at that time. It then entered a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure even though the same insurance coverage issues were on appeal to New York's highest court. The United States Court of Appeals for the Second Circuit exercised jurisdiction notwithstanding the improper certification and affirmed the decision of the district court.

As a matter of law, the certification was improper because the policyholders' claims against Petitioner could not be finally resolved independently of Petitioner's claims against the other insurers. Guidance from this Court is necessary to resolve conflicts between the Second Circuit and the Third and Seventh Circuits on the legal severability of related claims for purposes of Rule 54(b). In addition, this Court should address the constraints on the discretion of federal district courts sitting in diversity to enter partial final judgments on unsettled issues of state law soon to be resolved by that state's highest court.

## Opinions Below

The opinions of the United States Court of Appeals are reported at 894 F.2d 498 (2d Cir. 1990) and 887 F.2d 1200 (2d Cir. 1989). The opinions of the United States District Court are reported at 123 F.R.D. 80 (S.D.N.Y. 1988) and 697 F. Supp. 1314 (S.D.N.Y. 1988). The four opinions are reproduced in the appendix hereto.

## Jurisdiction

The opinion of the Second Circuit was entered October 18, 1989. The opinion of the Second Circuit denying rehearing but modifying its prior opinion was entered January 10, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## Federal Rule of Civil Procedure Involved

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

## STATEMENT OF THE CASE

Petitioner The Travelers Indemnity Company ("Travelers") insured Ogden Corporation ("Ogden") and its subsidiaries from July 5, 1975 to December 1, 1984. Avondale Industries, Inc. ("Avondale"), a former Ogden subsidiary, has been sued in a series of private lawsuits by persons residing near a waste oil recycling facility and dumpsite near Denham Springs, Louisiana. Each of the underlying complaints alleges that Avondale and others generated and shipped hazardous waste to the dumpsite. The plaintiffs in the private actions claim bodily injury and property damage from pollutants regularly discharged during the two decades that the site was in operation. In addition, in January 1986, Avondale received a "potentially responsible person" ("PRP") letter from the Louisiana Department of Environmental Quality (the "DEQ") naming Avondale as a person potentially responsible for cleaning up the dumpsite.

**Ogden and Avondale Sue Only One of Five Insurers that Provided Liability Coverage**

On December 16, 1986, Avondale and Ogden [hereinafter collectively referred to as Respondents] commenced a declaratory judgment action against Travelers seeking a declaration that Travelers has an obligation to defend and indemnify Avondale in connection with the private actions and the DEQ PRP letter. The district court had diversity jurisdiction over the subject matter of the dispute. 28 U.S.C. § 1332 (1982). Travelers filed its answer denying liability on March 9, 1987, and counterclaimed for a declaration that Travelers has no duty to defend or indemnify Avondale in connection with the private lawsuits or the DEQ letter. Travelers also filed a third-party complaint against the four other insurers that afforded coverage to Avondale during the time periods in which the private plaintiffs claim their personal injuries and property damage occurred: Commercial Union Insurance Company ("Commercial Union"), Highlands Insurance Company ("Highlands"), American Motorists Insurance

Company ("American Motorists") and National Union Fire Insurance Company ("National Union").

**The District Court's Ruling Granting Partial Summary Judgment to Ogden and Avondale**

On October 8, 1987, Respondents moved for partial summary judgment solely on the issues of Travelers obligation to defend Avondale in the private lawsuits and in connection with the DEQ PRP letter. The motion raised three unsettled issues of New York insurance law:

> 1. whether the "sudden and accidental" pollution exclusion clause in each Travelers policy barred coverage for twenty years of industrial discharges at the Denham Springs dumpsite;[1]

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[1] Specifically, the pollution exclusion provides that Travelers insurance does not apply:

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contamination or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

In construing the precise language at issue here, federal courts have disagreed with the interpretations of intermediate level state appellate courts. *See F L Aerospace* v. *Aetna Casualty & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990) (disagreeing with intermediate level Michigan appellate decisions on proper interpretation of pollution exclusion); *C.L. Hauthaway & Sons* v. *American Motorists Ins. Co.*, 712 F. Supp. 265, 268 (D. Mass. 1989) (disagreeing with intermediate level Massachusetts appellate court on proper interpretation of pollution exclusion); *Borden, Inc.* v *Affiliated FM Ins. Co.*, 682 F. Supp. 927, 929-30 (S.D. Ohio 1987) (disagreeing with intermediate level Ohio appellate court on proper interpretation of pollution exclusion), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 110 S. Ct. 68 (1989). The federal district courts have also disagreed with one another on the proper construction of the pollution exclusion under the laws of their respective states. *Compare Hayes* v. *Maryland Casualty. Co.*, 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) ("sudden and accidental" pollution exclusion bars coverage for

*(Footnote continued on next page)*

2. whether Travelers right and duty to defend any "suit" under the terms of its general liability policies obliged Travelers to defend Avondale in connection with the DEQ PRP letter;[2] and

3. whether governmentally mandated cleanup costs are "damages" covered under the terms of Travelers general liability policies.[3]

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routine discharges of waste) *with Pepper's Steel & Alloys, Inc.* v. *United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1548-50 (S.D. Fla. 1987) ("sudden and accidental" pollution exclusion applies only when the insured intends to harm the environment), *and Ray Indus.* v. *Liberty Mut. Ins. Co.*, 728 F. Supp. 1310, 1315-20 (E.D. Mich. 1989) (continuous discharge of pollutants over thirteen-year period not "sudden and accidental") *with United States Fidelity & Guar. Co.* v. *Thomas Solvent Co.*, 683 F. Supp. 1139, 1155-61 (W.D. Mich. 1988) ("sudden and accidental" exception to pollution exclusion is ambiguous and not limited to events that happen over a short period of time).

[2] Here, too, federal courts have disagreed with one another and declined to follow the lead of intermediate level state appellate courts. The federal district courts of Michigan provide the most striking example. *Compare Central Quality Services Corp.* v. *Insurance Co. of N. Am.*, *No.* 87-CV-74473-DT, slip op. at 12-20 (E.D. Mich. Sept, 6, 1989) (PRP letter is not a "suit" under Michigan law) *and Harter Corp.* v. *Home Indem. Co.*, 713 F. Supp. 231, 232-33 (W.D. Mich. 1989) (same) *and Arco Indus.* v. *Travelers Ins. Co.*, 730 F. Supp. 59, 65-8 (W.D. Mich. 1989) (same) *with Higgins Indus.* v. *Fireman's Fund Ins. Cos.*, 730 F. Supp. 774 (E.D. Mich. 1989) (PRP letter is a "suit" under Michigan law) *and Ray Indus.* v. *Liberty Mut. Ins. Co.*, 728 F. Supp. 1310, 1313-14 (E.D. Mich. 1989) (same) *and Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987) (same). Another federal district court applying New York law has declined to follow the result reached herein. *See Ryan, Klimek, Ryan Partnership* v. *Royal Ins. Co.*, 728 F. Supp. 862, 866-68 (D.R.I. 1990).

[3] General liability insurance policies typically provide that the insurer "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage." *See, e.g., Patrons Oxford Mut. Ins. Co.* v. *Marois*, No. KEN-89-284, slip op. at 4 (Me. Apr. 2, 1990).

Whether governmentally mandated environmental cleanup costs are "damages" in the context of liability insurance is perhaps the most hotly contested and financially significant commercial law issue today. The four state supreme courts that have addressed this question are evenly divided. *See Marois, supra*, slip op. at 4-9 (expenses incurred by insured to meet state clean-up demands are not "damages"); *Troy Mills* v. *Aetna Casualty & Sur. Co.*, No. 89-311, order (N.H. Feb. 13, 1990) (summarily affirming superior court decision holding that

*(Footnote continued on next page)*

The district court awarded partial summary judgment to Respondents on the issue of Travelers duty to defend in a memorandum opinion and order dated October 19, 1988. *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, 697 F. Supp. 1314 (S.D.N.Y. 1988). Its rulings on the three key issues of state environmental coverage law were as follows:

First, the district court held that Travelers had a duty to defend the private actions notwithstanding the pollution exclusion because the underlying complaints did not allege that Avondale intended to pollute and did not make specific allegations concerning the manner in which Avondale's particular shipments of waste escaped. 697 F. Supp. at 1317. Significantly, this ruling was at odds with the unanimous, two-week old decision of the Appellate Division of the Supreme Court of the State of New York in

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cleanup costs are not "damages" within the meaning of liability insurance policies); *C. D. Spangler Constr. Co.* v. *Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 388 S.E. 2d 557 (1990) (insured's expenses in complying with cleanup orders are "damages" within the meaning of liability insurance policies); *Boeing Co.* v. *Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990) (CERCLA response costs are "damages" within the meaning of liability insurance policies).

Federal courts cannot agree on how to interpret existing state law precedents. *Compare Avondale Indus.* v. *Travelers Indem. Co.*, 887 F.2d 1200, 1206-07 (2d Cir. 1989) (cleanup costs are "damages" under New York law) *with Travelers Indem. Co.* v. *Allied-Signal, Inc.*, 718 F. Supp. 1252, 1253 n.2 (cleanup costs are not "damages" under New York law), *and Maryland Casualty Co.* v. *Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) (cleanup costs are not "damages" under Maryland law), *cert. denied*, 484 U.S. 1008 (1988) *with Chesapeake Utils. Corp.* v. *American Home Assurance Co.*, 704 F. Supp. 551, 558-61 (D. Del 1989) (cleanup costs are "damages" under Maryland law); *compare Continental Ins. Cos.* v. *Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 983-87 (8th Cir.) (en banc) (cleanup costs are not "damages" under Missouri law), *cert. denied*, 109 S. Ct. 66 (1988) *with Jones Truck Lines* v. *Transport Inc.*, Co., No. 88-5723, slip op. at 11-21 (E.D. Pa. May 10, 1989) (cleanup costs are "damages" under Missouri law), *question to be certified to the Supreme Court of Missouri*, Nos. 89-1729/59 (3d Cir. Feb. 15, 1990) (Clerk's letter reprinted in the appendix hereto), *and Aetna Casualty & Sur. Co.* v. *Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989) (cleanup costs are not "damages" under Idaho law) *with Unigard Mut. Ins. Co.* v. *McCarty's, Inc.*, No. 83-1441, slip op. at 4-8 (D. Idaho Aug. 4, 1989) (cleanup costs are "damages" under Idaho law).

*Technicon Electronics Corp.* v. *American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d 91 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989), which squarely held:

> [T]he logical and proper application of the pollution exclusion depends solely upon the method by which the pollutants entered the environment . . . . The relevant factor is not whether the policyholder anticipated or intended the resultant injury or damage, but whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally.

141 A.D.2d at 144, 533 N.Y.S.2d at 103-04 (citation omitted).

Next, the district court declined to follow the explicit ruling of the Appellate Division in *Technicon* that an EPA PRP letter did not constitute a "suit" within the meaning of liability insurance policies and held that Travelers had a duty to "defend" the DEQ PRP letter.[4]

Finally, the district court rejected the reasoning of *Maryland Casualty Co.* v. *Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988), and *Continental Ins. Cos.* v. *Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1987) (en

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[4] The district court quoted the language from *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237 (1940), that a federal court should not disregard the decisions of intermediate state appellate courts "*'unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'*" 697 F. Supp. at 1320-21 (emphasis in original). *See Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). However, the district court identified no other "persuasive data" that the New York Court of Appeals would rule differently. By imposing a duty to defend the DEQ PRP letter without any support beyond its own disagreement with the Appellate Division, the district court redefined the *Estate of Bosch* and *West* standard to eliminate the self-restraint those decisions demand from the federal bench. *See West* v. *A. T. & T. Co.*, *supra*, 311 U.S. at 236-37 ("There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

banc), *cert. denied*, 109 S. Ct. 66 (1988), and held that under New York law, the costs of clean-up at the Denham Springs dumpsite constituted "damages" within the meaning of Travelers liability policies. 697 F. Supp. at 1318-20.

**The District Court Enters a Partial Final Judgment**

Following the district court's decision, Respondents moved pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for entry of a final judgment on Travelers duty to defend. Travelers opposed the entry of the partial final judgment on the following grounds:

> 1. New York's highest court would soon resolve the central issues in the case and there was no reason for the court to certify its ruling on Travelers defense obligations in advance of a definitive ruling from the New York Court of Appeals;
>
> 2. As a matter of law, no final judgment could be entered against Travelers in the main action without first adjudicating the defense obligations of the third-party defendants; and
>
> 3. Travelers would face substantial prejudice from the piecemeal adjudication of defense issues.

The district court dismissed Travelers objections and determined that there was "no just reason for delay" in entering a final judgment that placed the entire defense burden upon Travelers. Underscoring the district court's decision to make the Rule 54(b) certification was the court's belief in the importance of its own ruling. Specifically, the court stated:

> *[I]n view of the immensely important public policy questions relating to environmental hazard and safety in Louisiana and elsewhere that are fundamentally affected by liability, defense and indemnification findings in actions like this*, this Court

> concludes that there is no just reason for delay and directs the entry of partial final judgment upon its Opinion and Order of October 19, 1989.

123 F.R.D. at 83 (emphasis in original).

The public policy questions at issue in this case are important. However, the district court fundamentally misinterpreted its role as a federal court sitting in diversity. Its obligation was to apply state law and state policy, not to place the federal courts in the vanguard of state policymaking. Absent a pressing reason for certification, the district court's obligation was to obtain the most definitive exposition of New York law possible on unsettled issues of state law before entering a final judgment. Instead, the district court set in motion a process that required two opinions by the Second Circuit to keep pace with developments in the state courts and placed the federal courts in New York in conflict with the New York Court of Appeals on a question of New York law.

**Proceedings in the United States Court of Appeals for the Second Circuit**

Travelers argued its appeal before the Second Circuit on April 10, 1989. In the interval between oral argument and the initial disposition of Travelers appeal, the New York Court of Appeals decided *Technicon Electronics Corp.* v. *American Home Assurance Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989). New York's highest court affirmed the Appellate Division's ruling on the pollution exclusion and declined to reach the issue of whether PRP letters are "suits." Notwithstanding the Court of Appeals ruling in conflict with the result in the district court, the Second Circuit issued its decision approving the district court's Rule 54(b) certification and affirming the grant of partial summary judgment. *Avondale Industries, Inc.* v. *Travelers*

*Indemnity Co.*, 887 F.2d 1200 (2d Cir. 1989).[5] Following Travelers petition for rehearing and a second decision from the New York Court of Appeals, *Powers Chemco, Inc.* v. *Federal Insurance* Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989), the Second Circuit issued another opinion. *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, 894 F.2d 498 (2d Cir. 1990). That decision, dated January 10, 1990, denied Travelers petition for rehearing but substantively modified the Court's prior opinion.

In its first opinion, the Second Circuit read the New York Court of Appeals' interpretation of the pollution exclusion just as narrowly as the district court had construed the Appellate Division's earlier decision.[6] The Second Circuit held that the pollution exclusion applies only when the insured itself discharges waste. 887 F.2d at 1205. The federal appellate court thereby exempted from the terms of the pollution exclusion all generators of toxic substances that do not themselves discharge hazardous waste directly into the environment. This ruling represented a significant policy decision in conflict with New York's policy to prohibit "subsidized pollution." *See Ogden Corp.* v. *Travelers Indem. Co.*, No. 88 Civ. 4269, slip op. at 6 (S.D.N.Y. Sept. 22, 1989); *Technicon, supra*, 74 N.Y.2d at 76, 542 N.E.2d at 1051, 544 N.Y.S.2d at 534; Act of June 25, 1971, ch. 765, 1971 N.Y. Laws

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[5] The Second Circuit rejected Travelers objection to the Rule 54(b) certification based upon the irrelevant observation that "the duty to defend and the duty to indemnify are separate and distinct questions of fact and law." 887 F.2d at 1203. However, Travelers never contended otherwise. What Travelers argued both before the district court and in the Second Circuit was that Avondale's claim for defense from Travelers could not be fully and fairly resolved without also adjudicating the defense obligations of the third-party defendants.

[6] In addition to the ruling on the pollution exclusion, the Second Circuit affirmed the district court on the "suit" and "damages" issues. One federal district court has already declined to follow the Second Circuit's ruling on the "suit" question in favor of the Appellate Division's *Technicon* rationale. *See Ryan, Klimek, Ryan Partnership* v. *Royal Ins. Co.*, 728 F. Supp. 862, 866-68 (D.R.I. 1990).

1230; Executive Memorandum, Environmental Pollution—Prohibition Against Insurance Coverage, 1971 N.Y. Laws 2485.

The Second Circuit's approach could not stand after the Court of Appeals decided *Powers Chemco, Inc.* v. *Federal Insurance Co.*, 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989), and held: "Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured." *Id.* at 911, 548 N.E.2d at 1302, 549 N.Y.S.2d at 651.

Travelers petition for rehearing was pending at the time of the Court of Appeals ruling in *Powers Chemco*. The petition focused largely on the certification issue and the Second Circuit's failure to address the Appellate Division's decision in *Powers Chemco, Inc.* v. *Federal Insurance Co.*, 144 A.D.2d 445, 533 N.Y.S.2d 1010 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989). The Second Circuit ultimately issued an opinion denying Travelers petition for rehearing by distinguishing *Powers Chemco* on its facts. 894 F.2d 498 (2d Cir. 1990). However, the decision on rehearing modified the Second Circuit's prior opinion by retracting the ruling that the pollution exclusion applies only when the insured is the "active polluter." *Id.* at 500.

## Reasons for Granting the Writ

Petitioner respectfully submits that the Court should grant the writ of certiorari for two reasons:

1. To provide the lower federal courts with practical guidelines for determining when a partial final judgment may be entered on one claim in an action involving multiple claims and parties; and

2. To enforce the institutional limits on the discretion of a federal court sitting in diversity to use Rule 54(b) to preempt the decisions of state courts construing state law.

**Conflicting Rule 54(b) Standards in the Federal Courts of Appeal**

Working only with this Court's observation that some claims are so "inherently inseparable" that a district court cannot properly certify judgment on any one of them, *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 436 (1956), conflicting standards have been developed by the lower federal courts to evaluate claims that are legally and factually related. Noting the confusion surrounding this issue and the "natural tendency [of Rule 54(b)] to generate multiple appeals in the same case," one court has suggested that this Court reconsider its earlier Rule 54(b) decisions in light of the ever increasing caseloads of the federal appellate courts. *See Minority Police Officers Ass'n* v. *City of South Bend*, 721 F.2d 197, 200-01 (7th Cir. 1983).

At one extreme, the Second Circuit holds that so long as there are two distinct causes of action that involve some separate legal and factual questions and can be separately enforced, the district court may enter judgment under Rule 54(b). *See Cullen* v. *Margiotta*, 811 F.2d 698, 711 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987). At the other extreme, in the Seventh Circuit, a district court cannot enter final judgment if there is a significant factual overlap between the adjudicated and unresolved claims. *See Indiana Harbor Belt R.R.* v. *American Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988); *Automatic Liquid Packaging, Inc.* v. *Dominik*, 852 F.2d 1036, 1037 (7th Cir. 1988). Intermediate standards have been adopted as well. *See Gregorian* v. *Izvestia*, 871 F.2d 1515, 1520 (9th Cir.) *cert. denied*, 110 S. Ct. 237 (1989) (factual and legal issues of adjudicated claims must be "substantially different" from those raised by reserved claim); *Explosives Supply Co.* v. *Columbia Nitrogen Corp.*, 691 F.2d 486, 486-87 (11th Cir. 1982) (claims are separable if "neither the same issues nor facts would be before the reviewing court more than once."); *Morrison-Knudsen Co.* v. *Archer*, 655 F.2d 962, 965-966 (9th Cir. 1981) (Ken-

nedy, J.) (claims legally and factually inseperable insofar as they cannot be resolved without reference to each other).

As this case illustrates, in the decade since this Court last addressed Rule 54 (b), some of the lower federal courts have become so permissive in allowing piecemeal appeals that the circuit courts are deciding cases where they lack jurisdiction. By improperly exercising jurisdiction over the appeal below, the Second Circuit allowed the district court to enter final judgment on a claim that was necessarily dependent upon the resolution of unadjudicated third-party claims.

**The Federal Courts Should Not Employ the Rule 54(b) Certification Procedure In Diversity Cases When the Applicable State Law Is In Flux**

In a fundamental misperception of its role in this diversity case, the district court cited as its principal justification for finding "no just reason for delay" the importance of the state law policies in issue. However, this very consideration mandated that the district court refrain from entering a partial final judgment at a time when state law was in flux and not susceptible to accurate exposition by the federal courts.

The district court must have been cognizant that its predictions of New York environmental coverage law were controversial since it had declined to follow the most recent intermediate appellate decision that addressed these points. Instead of unnecessarily triggering a race between the federal and state appellate processes, the district court, at minimum, should have resolved all issues pertaining to the insurers' defense obligations in the first- and third-party actions before entering final judgment.

Contrast the confrontational approach taken by the Second Circuit with the deferential approach of the Third Circuit in applying state environmental coverage law. The Third Circuit dismissed for lack of appellate jurisdiction an appeal from a Rule 54(b) judgment on the "damages" and "suit" issues under New

York law in a case that is procedurally indistinguishable from this one. *See American Motorists Ins. Co.* v. *Levolor Lorentzen, Inc.*, 879 F.2d 1165 (3d Cir. 1989). In another case, when squarely faced with a controversial decision that governmentally mandated cleanup costs constitute "damages" under Missouri law, the Third Circuit notified the parties that it will certify the question to the Missouri Supreme Court. *See Jones Truck Lines* v. *Transport Ins. Co.*, No. 88-5723, slip op. at 11-21 (E.D. Pa. May 10, 1989), *question to be certified to the Supreme Court of Missouri*, Nos. 89-1729/59 (3d Cir. Feb. 15, 1990) (reprinted in appendix hereto).[7]

In the current uncertain legal climate and in light of the great number of pending cases, this Court should lay the ground rules to prevent the federal courts from obstructing the orderly evolution of state law doctrine.

## POINT I

### This Court Should Grant Certiorari To Enforce the Limitations on Federal Appellate Jurisdiction.

In an action with multiple parties or multiple claims for relief, Rule 54(b) of the Federal Rules of Civil Procedure permits a district court to enter final judgment on a single claim upon a

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[7] In *Continental Ins. Cos.* v. *Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1188-89 (8th Cir. 1987), *rev'd en banc*, 842 F.2d 977, *cert. denied*, 109 S. Ct. 66 (1988) (*"NEPACCO"*), a panel of the Eighth Circuit held that governmental suits to recover CERCLA cleanup costs sought "damages" under a liability policy and, therefore, were covered by liability insurance. After *en banc* consideration, the Eighth Circuit reversed the panel decision and concluded that cleanup costs are not "damages" under Missouri law. 842 F.2d at 985. The *NEPACCO* decision has been a source of great controversy in the federal courts. *See, e.g., Aetna Casualty & Sur. Co.* v. *General Dynamics Corp.*, No. 88-2220C (A), slip op. at 23-24 (E.D. Mo. Dec. 12, 1989) (following *NEPACCO*); *Cedar Chem. Corp.* v. *American Universal Ins. Co.*, No. 87-2838-4B, slip op. at 6 (W.D. Tenn. Sept. 13, 1989) (same); *Aetna Casualty & Sur. Co.* v. *Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989) (same); *Maryland Casualty Co.* v. *Ormond*, No. 87-3038, slip op. (W.D. Ark. Jan. 6, 1989) (disagreeing with *NEPACCO*, but following decision); *Federal Ins. Co.* v. *Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 173 (M.D. Pa. 1989) (disapproving *NEPACCO*); *Intel Corp.* v. *Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1188-89 (N.D. Cal. 1988) (same).

finding that there is "no just reason for delay."[8] The rule is designed to achieve speedy resolution of claims that need not be adjudicated together while avoiding piecemeal appeals. *See Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 432 (1956).

Rule 54(b) limits the circumstances under which a district court can enter partial final judgment in an action with multiple claims or parties. This Court has highlighted the requirements of the Rule:

> (1) There must be a full disposition of a single, distinct claim that is independent of the remaining claims in the multiple claim action. *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 7 (1980); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 582-83 (1980); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 743 (1976); *Sears, Roebuck & Co.*, *supra*, 351 U.S. at 436.
>
> (2) The decision must be final for purposes of 28 U.S.C. § 1291 (1982) in that all issues relating to the claim must be adjudicated. *See Curtiss-Wright Corp.*, *supra*, 446 U.S. at 7; *Sears, Roebuck & Co.*, *supra*, 351 U.S. at 437; *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).
>
> (3) The district court must consider the strong policy against multiple appeals in a single action and the relationship among the adjudicated and unadjudicated claims to determine whether there is just cause to delay entry of judgment until resolution of the remaining claims. *Curtiss-Wright Corp.*, *supra*, 446 U.S. at 8.

The relationship among the claims is relevant both to the legal determination of whether a single claim has been finally adju-

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[8] Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

dicated and to the discretionary evaluation of whether there is no just cause for delay. *See Sears, Roebuck & Co., supra*, 351 U.S. at 436 (claims may be so inherently inseparable or closely related that they cannot be decided separately); *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 452 (1956) ("the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion"); *Federal Deposit Ins. Co.* v. *Elefant*, 790 F.2d 661, 664-65 (7th Cir. 1986) (a "[c]laim under Rule 54(b) is defined with a view to avoiding double appellate review of the same issues").

On appeal from a Rule 54(b) judgment, the reviewing court must determine *de novo* that there has been a final and complete resolution of a single independent claim. *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10 (1980); *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1519 (9th Cir.), *cert. denied*, 110 S. Ct. 237 (1989); *Spiegel* v. *Trustees of Tufts College*, 843 F.2d 38, 43 (1st Cir. 1988); *ODC Communications Corp.* v. *Wenruth Investments*, 826 F.2d 509, 512 (7th Cir. 1987). If so, the reviewing court must honor the certification absent an abuse of discretion by the district court in assessing the equities. *See Curtiss-Wright Corp.*, *supra*, 446 U.S. at 10.

The partial summary judgment in this case did not fully and finally dispose of a claim separate and distinct from the claims in the third-party actions. Nor did it support certification under Rule 54(b) because certification virtually guaranteed multiple appeals on the issue of defense.

**A. Because Resolution Of Petitioner's Defense Obligations Necessarily Depended Upon The Adjudication Of Petitioner's Third-Party Defense Claims, Certification Was Improper And The Second Circuit Lacked Jurisdiction To Hear The Appeal.**

As a legal and factual matter, Travelers defense obligations are so "inherently inseparable" from those of the third-party de-

fendant insurers that the district court could not enter final judgment on Travelers obligation to defend without resolving the third-party claims. *See Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 436 (1956). Because there was no adjudication of a separate claim, the district court improperly entered judgment and the Second Circuit lacked jurisdiction over the appeal.

Respondent Avondale seeks defense costs from Petitioner Travelers. Travelers, in turn, has brought a claim for reimbursement of defense costs against Avondale's other insurers. This claim for reimbursement derives from the "other insurance" clause found in each Travelers insurance contract in issue. This clause provides:

> This insurance shall apply in excess of all other liability insurance available to the insured, and in excess of all property damage insurance available to the named insured, and then shall apply only in the amount by which the applicable limit of liability of this policy exceeds the sum of the applicable limits of liability of all other such insurance, including any deductible provisions thereof.

Pursuant to this clause, Petitioner is an excess insurer and pays no defense costs to the extent the insured has purchased other primary insurance from the third-party defendants.[9]

The Travelers "other insurance" clause contains a second provision which provides as follows:

> Without waiving the [above-quoted clause], if any insurer affording other insurance to the named insured denies primary

[9] Two of the third-party defendants, Commercial Union and Highlands, in contrast, have "pro rata" other insurance clauses in their contracts which contemplate a proportional allocation of defense costs among the primary insurers. Under New York law, they, not Petitioner, must defend Avondale. *See General Accident Fire & Life Assurance Corp.* v. *Piazza*, 4 N.Y.2d 659, 669, 152 N.E.2d 236, 241, 176 N.Y.S.2d 976, 983 (1958); *Albany Truck Rental Serv.* v. *New Hampshire Merchants Ins. Co*, 75 A.D.2d 426 430-32, 430 N.Y.S.2d 188, 161-62 (3d Dep't 1980); *Great American Ins. Co.* v. *Schaefers*, 47 Misc. 2d 522, 525, 262 N.Y.S.2d 953, 956-57 (Sup. Ct. N.Y. Co. 1965); *cf. Federal Ins. Co.* v. *Cablevision Systems Dev. Co.*, 836 F.2d 54, 57-58 (2d Cir. 1987) (applying other insurance clauses in consecutive primary insurance policies).

> liability under its policy, the company will respond under this policy as though such other insurance were not available, *provided that the company shall be subrogated to all rights of the insured to such other insurance and the insured shall do all things necessary to enforce such rights.*

(emphasis supplied).

The other primary insurers have, like Petitioner, denied liability for defense and indemnity in connection with the private actions and the state-sponsored cleanup in Louisiana. Under the terms of the Travelers contracts in issue, therefore, Travelers has contracted to "drop down" and provide a defense in exchange for the insured's ri ghts against the other insurers *on the express condition that* the insured has protected Travelers subrogation rights. Absent affirmative steps by Respondents to protect their rights against the other insurers, Travelers is not obligated to provide a defense.

Similarly, in addition to its rights under the "other insurance" clause, Travelers is entitled to an apportionment of defense costs based upon express contractual subrogation rights set forth in Travelers policies[10] as well as general equitable principles. Travelers has no obligation to fund Avondale's defense to the extent Avondale has not protected Travelers subrogation rights. *See Weinberg* v. *Transamerica Ins. Co.*, 62 N.Y. 2d 379, 382-83, 465 N.E.2d 819, 821, 477 N.Y.S.2d 99, 101 (1984) (insured's failure to protect the subrogation rights of its insurer precludes insured from recovering benefits under policy); *State Farm Mutual Auto. Insurance Co.* v. *Taglianetti*, 122 A.D.2d 40, 40-1, 504 N.Y.S.2d

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[10] Each Travelers policy in issue provides:

> In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization (except to the extent such person or organization is entitled to coverage under this policy) and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. *The insured shall do nothing after loss to prejudice such rights.*
>
> (emphasis supplied).

476, 476 (2d Dep't 1986) (same); *Record* v. *Royal Globe Insurance Co.*, 83 A.D.2d 154, 158, 443 N.Y.S.2d 755, 757 (2d Dep't 1981) (same); *cf. Insurance Co. of N. Am.* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980) (insured must bear portion of defense costs for period during which it has no liability insurance), *cert. denied*, 454 U.S. 1109 (1981); *Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 685 F. Supp. 621, 626 (E.D. Mich. 1987) (same).

Whether Respondents took such steps is at issue in both the main and third-party actions. In answering Petitioner's third-party complaint, each insurer raised as a defense that it had received late notice of the underlying claims from the Respondents and therefore had no insurance obligations with respect to those claims. If the other insurers prevail on this defense, the district court will find that Respondents failed to present diligently the claims to its other insurers.[11] Such a finding, in turn, would excuse Petitioner from all or part of its defense obligations by operation of the above-quoted clauses in Travelers insurance contracts.

Petitioner's liability for defense costs necessarily depends on Respondents' rights against the third-party defendants and their efforts to protect those rights. *See International Controls Corp.* v. *Vesco*, 535 F.2d 742, 746-47 n.4 (2d Cir. 1976).[12] Two claims are

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[11] This is not just a theoretical possibility. In another hazardous waste coverage dispute involving the same parties, a district court found that Avondale had waived its rights under policies issued by American Motorists because Avondale failed to provide timely notice. *See Ogden Corp.* v. *Travelers Indemnity Co.*, No. 88 Civ. 4269, slip op. at 10-20 (S.D.N.Y. Sept. 22, 1989).

[12] Conversely, if the district court had adjudicated the third-party claims in favor of Petitioner without resolving the claims in the complaint, it could not certify the judgment under Rule 54(b). The obligations of the third-party defendants to Petitioner do not accrue until it is determined that Petitioner has an obligation to defend Avondale. *See Consolidated Rail Corp.* v. *Fore River Ry.*, 861 F.2d 322, 326 (1st Cir. 1988); *United States Fire Ins. Co.* v. *Smith Barney, Harris Upham & Co.*, 724 F.2d 650, 652-53 (8th Cir. 1983). Likewise, resolution of the third-party claims may nullify, in whole or in part, Petitioner's duty to defend pursuant to the main action.

not separate for Rule 54(b) merely because one is in the complaint and the other is in the third-party complaint. *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 9 (1980); *Automatic Liquid Packaging, Inc.* v. *Dominik*, 852 F.2d 1036, 1037 (7th Cir. 1988). The construction and application of the contracts in the third-party action bear directly on the certified claim and preclude invocation of Rule 54(b). *See Morrison-Knudsen Co.* v. *Archer*, 655 F.2d 962, 965 (9th Cir. 1981) (Kennedy, J.). This case is thus distinguishable from *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956), where the presence of an unadjudicated compulsory counterclaim was not necessarily a bar to relief on plaintiff's claim and accordingly did not preclude certification.

Petitioner's duty to pay defense costs, therefore, is not separable from the defense obligations of the other insurers—obligations that the district court has reserved for later adjudication. Because there has been no resolution of a single claim separate and independent of the remaining claims, the district court could not certify the disposition of Respondents' motion for summary judgment and the Second Circuit was without jurisdiction to hear the appeal.

**B. Certification Was Improper Because There Was No Final Resolution Of All Issues Relating To Petitioner's Obligation To Pay Defense Costs.**

Nor has there been a "final" disposition of Respondents' claim for defense costs from Petitioner. There has been no resolution of whether Respondents have preserved Petitioner's subrogation rights, which is a condition precedent to Petitioner's defense obligation. Travelers has asserted that it has no obligation to provide Avondale the full defense ordered by the district court if Avondale has failed to preserve Travelers subrogation rights. This unresolved issue precludes entry of judgment pursuant to Rule 54(b): "[t]he District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the

meaning of [28 U.S.C.] § 1291." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956) (emphasis in original). *See Spiegel* v. *Trustees of Tufts College*, 843 F.2d 38, 43 (1st Cir. 1988); *Rudd Constr. Equip. Co.* v. *Home Ins. Co.*, 711 F.2d 54, 56 (6th Cir. 1983); *Acha* v. *Beame*, 570 F.2d 57, 62 (2d Cir. 1978).

The Second Circuit's failure to address the interlocutory character of the order conflicts with the Third Circuit's consideration of an insurer's duty to defend in *American Motorists Ins. Co.* v. *Levolor Lorentzen, Inc.*, 879 F.2d 1165 (3d Cir. 1989). In that case, the district court improperly certified a judgment before it had resolved all issues relating to the insurer's duty to defend. Specifically, the district court ruled on two of the same three substantive issues presented in this case (that the insurer had a duty to defend a PRP letter and that an EPA cleanup proceeding sought "damages" within the meaning of a liability policy) but reserved judgment upon the applicability of the pollution exclusion. As the Third Circuit observed, if the insurer is

> successful in advancing the pollution exclusion, undeniably the initial determination that it had a duty to defend will, regardless of the form of any new order, be effectively revised because the [prior order] granted Levolor's motion for summary judgment "with respect to the issue of the obligation of [the insurer] to provide a defense" and that obligation will no longer exist.

*Id.* at 1170. Accordingly, the Third Circuit dismissed the appeal for lack of appellate jurisdiction.

Here, too, the district court below improperly "made a certification in the midst of an ongoing controversy," *id.* at 1171, by failing to resolve all of Petitioner's theories that limit its obligation to bear the full cost of Avondale's defense. As in *Levolor Lorentzen* where subsequent resolution of the pollution exclusion issue in favor of the insurer could alter the "final" determination of the insurer's duty to defend, if the district court eventually determines that Respondents untimely notified the other insurers of

the Louisiana claims, the court will have to reconsider its determination that Petitioner has a duty to provide Avondale a full defense.

A judgment properly ordered pursuant to Rule 54(b) is final for all purposes including appeal, execution and *res judicata*. *See Shamley* v. *ITT Corp.*, 869 F.2d 167, 170 (2d Cir. 1989). Thus, if the Rule 54(b) certification stands, Petitioner may be forever precluded from asserting Respondent's failure to protect Travelers subrogation rights as a defense to plaintiffs' claim, *even if* the district court rules in the third-party action that Respondent failed to notify timely the third-party defendants of the underlying claims. Moreover, the third-party defendants may receive the benefit of any intervening state decisions to the prejudice of Petitioner.

## POINT II

### This Court Should Grant Certiorari To Enforce The Institutional Limits On A Federal Court's Discretion When Sitting In Diversity.

Provided there has been a final adjudication of a separate and independent claim, entry of judgment is left to "the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). In exercising that discretion, however, a district court cannot disregard the institutional limits on its authority as a federal court sitting in diversity.

After a year's delay before ruling on Respondent's motion for summary judgment, the district court sought to resolve finally Respondents' claim for defense costs before the imminent and authoritative consideration of identical legal issues by the New York Court of Appeals. This constituted an abuse of discretion because (1) it unnecessarily and precipitously forced federal appellate scrutiny in a rapidly developing area of state law, and (2) it created the palpable danger that intervening state court decisions

will dictate an inconsistent resolution of identical legal issues in the third-party action.

By certifying its order before resolving all claims concerning defense, the district court compelled the Second Circuit to deal with unsettled state law issues that were about to be addressed by New York's highest court. *See Blanchard* v. *Teledyne Movible Offshore, Inc.*, 612 F.2d 971, 971-72 (5th Cir. 1980) (setting aside certification because Supreme Court had granted certiorari in a case that could dispositively resolve claim); *Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939, 943 (2d Cir. 1968) ( "Tempting as it is to decide this intriguing question of New York tort law, we respectfully decline the invitation."). This abuse of discretion violated the strong federal policies against multiple appeals and unnecessary adjudication of novel state law issues. Moreover, the entry of partial final judgment in this period of rapid change in New York state law has prejudiced Petitioner in its effort to enforce its contractual and equitable subrogation rights in the main and third-party actions.

Thus, Travelers had to brief and argue this case without the benefit of the favorable Court of Appeals rulings and the Second Circuit had to modify its initial disposition to catch up with evolving state law. As matters now stand, there are two bodies of New York environmental coverage law—one state and one federal—and litigants are faced with the prospect of conflicting substantive results depending upon whether they are in federal or state court. *See Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

Moreover, because the identical legal questions concerning an insurer's defense obligations are being litigated in the third-party action, the Second Circuit likely will face a second appeal on these issues. A plainer violation of the policy against multiple appeals cannot be imagined. *See Consolidated Rail Corp.* v. *Fore River Ry.*, 861 F.2d 322, 325 (1st Cir. 1988); *Cullen* v. *Margiotta*, 811 F.2d 698, 710 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *United States Fire Ins. Co.* v. *Smith Barney, Harris Upham & Co.*, 724 F.2d

650, 652 (8th Cir. 1983); *Panichella* v. *Pennsylvania R.R.*, 252 F.2d 452, 455 (3d Cir. 1958); *El-Marzouki Estab.* v. *Environmental Research & Development, Inc.*, 93 F.R.D. 661, 662 (S.D.N.Y. 1982).

Indeed, the pendency of the third-party claims underscores the manifest prejudice that Petitioner will suffer as a result of the certification. The third-party defendants may receive the benefit of the most recent exposition of New York law by the highest state court while Petitioner will be held to the district judge's earlier application of state law. Thus, the district court could rule in the third-party action that pollution exclusions in the other insurance contracts exclude coverage notwithstanding its inconsistent ruling that the pollution exclusion was no bar to coverage in the main action. This precipitous and piecemeal federal appellate consideration of the full range of environmental coverage issues contrasts markedly with the cautious approach taken by the New York Court of Appeals in *Technicon.* 74 N.Y.2d 66, 76, 542 N.E.2d 1048, 1051, 544 N.Y.S.2d 531, 534 (1989).

This is not a case where entry of final judgment fully resolved the claims of two litigants or even materially advanced the resolution of the dispute. The partial final judgment did substitute Travelers for Ogden as the entity paying counsel previously selected *by Avondale*. However, in the event of an adverse judgment after resolution of all defense issues or even after a decision on the ultimate indemnification question, Travelers would have been in position to reimburse Ogden, one of the nation's largest corporations, for Ogden's costs in funding Avondale's defense, plus interest.

Yet, the entry of final judgment has taxed fair and efficient adjudication. The improper exercise of discretion resulted in fragmented appeals, unnecessary federal court speculation on evolving questions of state law, and possible inconsistent resolutions of identical legal questions within a single action.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
April 10, 1990

Respectfully submitted,

/s/ Barry R. Ostrager

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# APPENDICES

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

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## OPINION ON PETITION FOR REHEARING

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No. 999—August Term 1988
(Argued April 10, 1989 Decided October 18, 1989)

**(Petition for Rehearing Filed November 9, 1989**

Decided January 10, 1990)
Docket No. 89-7035

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AVONDALE INDUSTRIES, INCORPORATED and
OGDEN CORPORATION,
*Plaintiffs-Appellees,*

*v.*

THE TRAVELERS INDEMNITY COMPANY,
*Defendant-Third-Party*
*Plaintiff-Appellant,*

*v.*

COMMERCIAL UNION INSURANCE COMPANY,
HIGHLANDS INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
and NATIONAL UNION FIRE INSURANCE COMPANY,
*Third-Party*
*Defendants-Appellees.*

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Before:

NEWMAN, CARDAMONE, AND WINTER
*Circuit Judges*

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Petition for rehearing is filed by appellant, Travelers Indemnity Company, and *amici,* Insurance Environmental Litigation Association and New York State Insurance Association, on the basis of two opinions of the New York Court of Appeals filed over one month after and one day before our opinion in *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, No. 89-7035, slip op. 6237 (2d Cir. Oct. 18, 1989).

Denied.

(Reported at 894 F.2d 498)

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BARRY R. OSTRAGER, New York, New York (Simpson Thacher & Bartlett, New York, New York, of counsel), *for Defendant-Appellant The Travelers Indemnity Company.*

THOMAS W. BRUNNER, Washington, D.C. (Marilyn E. Kerst, Frederick S. Ansell, Wiley, Rein & Fielding, Washington, D.C., of counsel), *filed a letter brief for Insurance Environmental Litigation Association as Amicus Curiae.*

PATRICK J. FOLEY, New York, New York, *filed a memorandum for New York State Insurance Association as Amicus Curiae.*

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**PER CURIAM:**

Appellant, Travelers Indemnity Company (Travelers), and *amici*, Insurance Environmental Litigation Association and New York State Insurance Association, urge us to grant their petition for rehearing in *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, No. 89-7035, slip op. 6237 (2d Cir. Oct. 18, 1989), on the basis of two cases handed down by the New York Court of Appeals, which were not available at the time we decided *Avondale.* One is *Powers Chemco, Inc.* v. *Federal Insurance Co.*, No. 243 (N.Y. Ct. App. Nov. 21, 1989), and the other is *A. Meyers & Sons* v. *Zurich*

*American Insurance Group*, 74 N.Y.2d 298 (1989). *See Huddleston* v. *Dwyer*, 322 U.S. 232, 236-37 (1944); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); *see also Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 424 F.2d 427, 428-30 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970). Because we do not think these opinions are contrary to *Avondale*, the petition for rehearing is denied.

**Powers Chemco**

In *Powers Chemco* the New York Court of Appeals held that the defendant insurer was not obligated to indemnify the plaintiff for cleanup expenses associated with its decontamination of property purchased from a party who had allegedly buried, dumped and discharged hazardous wastes onto the property because such damage fell within the coverage exclusion for pollution damage that was not "sudden" and "accidental." *Avondale* is factually distinguishable from *Powers Chemco*. In *Powers Chemco*, the plaintiff seeking indemnification by the defendant insurer, by entering into an interim consent decree with the New York State Department of Environmental Conservation to decontaminate the property, effectively admitted that the prior landowner had engaged in intentional conduct that caused the pollution damage at issue. In *Avondale*, to the contrary, neither the plaintiff—nor any other party for that matter—has ever conceded that it engaged in intentional conduct that resulted in pollution damage. Without an admission—nor even an allegation of intentional conduct—we concluded in *Avondale* that the possibility that the pollution damage was both sudden and accidental had not been "clearly negate[d]."

Petitioners further note an apparent contradiction between our reliance upon the fact that there was "no allegation that Avondale *itself* continuously and intentionally polluted," *Avondale*, slip op. at 6250 (emphasis added), and the statement in *Powers Chemco* that "there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is

premised on the conduct of someone other than the insured," *Powers Chemco*, slip op. at 2. This inconsistency does not furnish grounds for rehearing because, in fact, in *Avondale no party* was alleged to have or admitted to having engaged in intentional conduct that caused the pollution damage. We acknowledge that the above-quoted statement suggests otherwise and therefore modify the language in the opinion to read that there is "no allegation that Avondale or any other party continuously and intentionally polluted."

As a second matter, petitioners direct attention to the Court of Appeals' finding of intentional conduct based upon the complaint in *Powers Chemco* which alleged that the plaintiff's predecessor " (1) 'bur[ied] drums containing the wastes,' (2) 'dump[ed] waste liquids . . . ,' and (3) discharg[ed] 'wastes . . . .' " *Powers Chemco*, slip op. at 2. From this they argue that we must find that Avondale engaged in intentional conduct because of the synonymity between the act of burying wastes alleged in *Powers Chemco* and the acts of transporting and disposing of wastes alleged in *Avondale*.

We do not believe that the New York Court of Appeals' holding in *Powers Chemco* was meant to be read so broadly. The complaint in that case alleged a consistent course of intentional conduct by the plaintiff's predecessor—burying, dumping and discharging wastes onto the property—which resulted in pollution damage. This obviously intentional course of conduct was buttressed by the plaintiffs entering into a consent decree that conceded it. It does not strike us that the New York court would have held that the plaintiff's predecessor had engaged in intentional conduct were the complaint to have alleged solely that the prior owner had buried drums of hazardous wastes on the property, without the additional charges of dumping liquids and discharging wastes. Thus, the mere allegation in the *Avondale* complaints that it transported and disposed of wastes without more is insufficient in our view to establish that it engaged in in-

tentional conduct that caused pollution damage. The complaint does not negate the possibility of intentional transportation and burying of properly sealed drums containing wastes, followed by sudden and accidental discharge from such drums.

**Meyers**

New York State Insurance Association argues that our analysis in *Avondale* of the right to defend runs contrary to the New York Court of Appeals' holding in *Meyers* that the insurer must defend where there is a "reasonable possibility" that the allegations in the underlying complaints support a duty to defend. This argument is meritless. In *Avondale* we rely upon the same line of cases as the court in *Meyers*, and there is no difference between our analysis of whether the "complaint in the underlying action contains any allegations that arguably or potentially bring the action within the protection purchased," *Avondale*, slip op. at 6248, and the Court of Appeals' analysis of whether there is a "reasonable possibility that the insured may be held liable for some act or omission covered by the policy," *Meyers*, 74 N.Y.2d at 302.

**CONCLUSION**

For the reasons stated, the New York Court of Appeals' holdings in *Powers Chemco* and *Meyers* do not require a change in our holding in *Avondale*. Hence, the petition for rehearing is denied.

**OPINION OF CARDAMONE, J.**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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No. 999—August Term 1988

(Argued April 10, 1989 Decided October 18, 1989)

Docket No. 89-7035

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AVONDALE INDUSTRIES, INCORPORATED and
OGDEN CORPORATION,
*Plaintiffs-Appellees,*

*v.*

THE TRAVELERS INDEMNITY COMPANY,
*Defendant-Third-Party*
*Plaintiff-Appellant,*

*v.*

COMMERCIAL UNION INSURANCE COMPANY,
HIGHLANDS INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
and NATIONAL UNION FIRE INSURANCE COMPANY,
*Third-Party Appellees.*

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Before:

NEWMAN, CARDAMONE, AND WINTER
*Circuit Judges*

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Travelers Indemnity Company appeals from a judgment of the United States District Court for the Southern District of New York (Conboy, J.) entered on December 7, 1988 that granted plaintiffs—appellees, Avondale Industries, Inc. and Ogden Corporation, summary judgment and declared that appellant had a duty to defend appellees in private actions and administrative proceedings initiated against plaintiffs in the State of Louisiana. Partial final judgment was entered pursuant to Fed. R. Civ. P. 54(b).

Affirmed.

(Reported at 887 F.2d 1200)

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BARRY R. OSTRAGER, New York, New York (Seth A. Ribner, Michael Bailey, Brian G. Hart, Simpson Thacher & Bartlett, New York, New York; George A. McKeon, General Counsel, Thomas L. Forsyth, Kathleen M. Hannon, Hartford, Connecticut, of counsel), *for Defendant-Appellant The Travelers Indemnity Company.*

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Thomas W. Brunner, Washington, D.C. (James M. Johnstone, Frederick S. Ansell, Wiley, Rein & Fielding, Washington, D.C., of counsel), *filed a brief for Insurance Environmental Litigation Association as Amicus Curiae.*

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CARDAMONE, *Circuit Judge:*

Millions of tons of hazardous waste generated yearly are stored, deposited, recycled or dumped, and eventually escape infusing lakes, streams and underground waters; this toxic material finally comes into contact with unprotected people who are its victims. When its source is identified, the question becomes who is to clean it up and who is to pay for the damages it caused. According to a recent study by the Rand Corporation, in the last eight years only 34 of the 1,175 most egregious toxic waste dumps were cleaned—and of the dumps cleaned, polluters paid less than

one-tenth of the cost. *See* N.Y. Times, Sept. 10, 1989, at A32, col. 1. This appeal confirms that the vast carelessness that created the conundrum of hazardous waste, which has continued for decades, will not be quickly or easily remedied. One facet of the problem is presented in this case: whether an insured may rely upon its insurer to defend it in litigation arising from claims that the insured improperly disposed of its toxic waste.

Appellant Travelers Indemnity Company (Travelers) appeals from a December 7, 1988 judgment of the United States District Court for the Southern District of New York (Conboy, J.), entered pursuant to a memorandum opinion and order dated October 19, 1988 granting partial summary judgment in a declaratory judgment action instituted by appellees Avondale Industries, Inc., a former subsidiary of Ogden Corporation (collectively appellee or Avondale). The judgment declared that Travelers had a duty to defend Avondale in private litigation in Louisiana and in a public administrative proceeding instituted against it by the State of Louisiana stemming from Avondale's disposal of hazardous waste products. Partial final judgment was entered in favor of Avondale pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

## BACKGROUND

Avondale is in the business of building and repairing commercial and U.S. Navy ships in New Orleans, Louisiana. As a part of its operations, it removes oil and chemical wastes from the holds and fuel tanks of the ships and barges it services. These petroleum products and chemical compounds, stored by it in holding tanks, were from 1975 to 1979 blended and sold to Combustion, Inc. Combustion transported the salvage oil from Avondale's plant to an oil recycling facility it owned near Baton Rouge, Louisiana. There, Combustion processed and resold the "salvage oil" that Avondale had sold it. The recycling facility and dump site at Denham Springs, Louisiana is the subject of the present

litigation. This litigation was commenced by a series of lawsuits brought by persons residing near the Denham Springs facility who claimed personal injury and property damage caused by pollutants emanating from the dump site.

Travelers insured Avondale from 1975 to 1984 under a comprehensive general liability insurance policy that provided

> [Travelers] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this policy applies caused by an occurrence, . . . and [Travelers] shall have the right and duty to defend any suit against the insured seeking damages on account of such injury or damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient . . . .

The policy also contained the following "pollution exclusion" and "sudden and accidental" exception to the exclusion:

> [Coverage shall not apply] to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, . . . [or] toxic chemicals . . . into or upon land, the atmosphere or any watercourse or body of water; *but* this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*. (emphasis supplied).

In 1986, Avondale was one of a number of defendants named in the many private damage actions brought as a result of the waste site owner's allegedly tortious operations. These complaints asserted that defendants' containment measures were "insufficient;" that defendants "generated" hazardous substances; that defendants were culpable for the "escape" of hazardous materials. Importantly, there are no specific claims as to *how* the

waste allegedly was discharged or escaped into the environment, or that Avondale—or any other defendant for that matter—intentionally or knowingly polluted the waste site in Louisiana.

Additionally, in January 1986, Avondale received a letter from the office of the Attorney General of Louisiana, issued at the request of the Louisiana State Department of Environmental Quality (DEQ). The DEQ letter notified Avondale of the Department's intention "to take immediate action to bring about the prompt and thorough cleanup of a hazardous waste site in Livingston Parish, commonly known as the Combustion, Inc. Oil Recycling Facility and to recover all costs of remediation expended by the State . . . at that site." The letter noted that appellee was a "potentially responsible party" and demanded that it provide information with respect to the types of substances disposed, the location of disposal at the site, as well as certain names and dates. The DEQ letter also notified Avondale that willful disregard of the DEQ requests would result in potential penalties of up to $25,000 for each day that the information was not received, and the waiver of certain defenses available under Louisiana law. Finally, the letter made a "demand" that Avondale "submit a plan for remedial action at the site . . . or . . . pay to the Secretary the full costs of a remedial action" incurred by the State. The letter also required appellee, and other potentially responsible parties, to attend a meeting or face having a suit instituted against it by the Department.

Avondale notified Travelers of these developments and invoked the insurer's contractual duty to defend it in both the private and public actions. When Travelers was unresponsive, Avondale turned to the courts.

## PRIOR PROCEEDINGS

Avondale instituted this diversity action pursuant to 28 U.S.C. § 2201 (1982) seeking a judgment against Travelers declar-

ing that it is contractually obligated to defend and indemnify Avondale in the underlying private and administrative proceedings. Upon appellee's motion for partial summary judgment on its duty to defend claim, Judge Conboy held that Travelers' duty to defend extended to both the DEQ proceeding and the private lawsuits. *See Avondale Indus., Inc.* v. *Travelers Indem. Co.*, 697 F. Supp. 1314, 1316–18 (S.D.N.Y. 1988) (private suits); *id.* at 1318-20 (DEQ action). Avondale subsequently moved for entry of a partial final judgment pursuant to Fed. R. Civ. P. 54(b) following the district court's determination that Travelers was obligated to defend.

Acknowledging that the duty to defend is distinct and separable from any duty to indemnify, the trial court held that there was no just reason to delay entry of final judgment. *See Avondale Indus., Inc.* v. *Travelers Indem. Co.*, 123 F.R.D. 80 (S.D.N.Y. 1988). In so doing, it rejected Travelers' assertions that it would be prejudiced in its actions against third-party defendants, which Travelers had previously impleaded, and that a delay would not, in any case, prejudice Avondale. *Id.* at 83. Further, the district judge rejected Travelers' request that it await decision by the New York Court of Appeals in a purportedly similar case concerning an insurer's duty to defend in *Technicon Electronics Corp.* v. *American Home Assurance Co.*, 141 AD2d 124 (2d Dep't 1988), *aff'd*, 74 NY2d 66 (1989). Travelers appeals the entry of the Rule 54(b) judgment. We affirm.

## DISCUSSION

Three questions are presented for review: (1) whether the certification of final judgment under Rule 54(b) properly issued; (2) whether as a matter of law Travelers had a duty to defend Avondale in the private damage actions; and (3) whether the DEQ proceeding was a suit exposing Avondale to damages within the meaning of the comprehensive general liability insurance policy requiring Travelers to defend that action.

**I. Rule 54(b) Certification**

A long standing common law rule holds that an appeal may not be taken until all the matters in controversy in the trial court are disposed of, so as to prevent a case from being appealed in fragments. *See Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262, 264-65 (1893). The rule against piecemeal appeals is firmly embodied in Fed. R. Civ. P. 54(b) that today permits the district court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." To meet the need for flexibility without weakening the salutary requirement of finality before permitting an appeal, "the District Court is used as a 'dispatcher.' " *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). Under the Rule "upon an express determination that there is no just reason for delay," it may make "an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

A district court issuing a partial judgment is required to explain its reasoning. *Ansam Assocs., Inc.* v. *Cola Petroleum, Ltd.*, 760 F.2d 442, 445 (2d Cir. 1985); *Cullen* v. *Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980) (per curiam). In reviewing a Rule 54 judgment, an appellate court must first assure itself respecting the separateness of the claims or parties so as to prevent piecemeal appeals in cases where the finality rule would ordinarily apply. On this aspect of an appeal the scope of review is broad. *See* 10 Wright-Miller-Kane, *Federal Practice and Procedure*, § 2655, at 43 (2d ed. 1983). Once these juridical concerns are satisfied, the determination of the district court as to just cause for delay is entitled on appeal to considerable deference, subject to reversal only for an abuse of discretion. *See Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 10 (1980).

Claims are separable "if they involve at least some different questions of fact and law and could be separately enforced." *See*

*Cullen* v. *Margiotta*, 811 F.2d 698, 711 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987). It is well-settled that the duty to defend and the duty to indemnify are separate and distinct questions of fact and law. *See Servidone Constr. Corp.* v. *Security Ins. Co.*, 64 NY2d 419, 424 (1985) ("The duty to defend is measured against the allegations of pleadings[,] but the duty to pay is determined by the actual basis for the insured's liability to a third person."). We are satisfied that the claim adjudicated, and upon which final judgment was entered, was separable from the other claims presented.

Travelers does not seriously contend that the first requirement of Rule 54(b) is not fulfilled. Instead, it argues vigorously that Avondale will suffer neither prejudice nor hardship should there be any delay in the entry of final judgment. Travelers notes that Avondale was at the time a subsidiary of Ogden Corporation, a large company that is purportedly providing for Avondale's defense in Louisiana, and argues that Avondale now seeks merely to shift payment from its former parent to its insurer. Avondale is actually exposed to no prejudice or hardship, appellant continues, and it is Travelers that may be prejudiced in its claims against other third-party defendants. Again, Travelers asserts that Rule 54(b) certification violated critical institutional concerns regarding finality because the district court disregarded a purportedly controlling state court precedent, a case then awaiting appeal to the state's highest court. We reject each of these arguments.

First, Avondale could be prejudiced were it forced to await final judgment on all its claims against Travelers. Beyond the cost of defending itself in the Louisiana actions, an insured is entitled to "litigation insurance" under New York law, as part and parcel of the insurer's duty to defend. *See, e.g., Seaboard Sur. Co.* v. *Gillette Co.*, 64 NY2d 304, 310 (1984), *International Paper Co.* v. *Continental Casualty Co.*, 35 NY2d 322, 326 (1974). Moreover, a unitary defense in the underlying actions would ameliorate possibilities that Travelers would later object to appellee's litigation

strategy and the expenses Avondale incurred by defending itself. The defense costs in Louisiana are likely to be substantial and there is no reason that Avondale should delay having its insurer step in and defend it. We see no prejudice to Travelers in dealing with the other insurers.

Nor is there any affront to the institutional interests of the federal courts. Travelers seems to suggest that in this diversity case the district court either guessed at what the state law was or disregarded it. Neither contention is true. As noted below, *Technicon*, the supposedly authoritative case, is distinguishable because the insured in that case conceded that it had intentionally discharged industrial wastes. Hence, we conclude that the district court did not abuse its discretion in certifying partial final judgment under Rule 54(b).

**II. Travelers' Duty to Defend the Private Actions**

We next consider whether under New York law and the subject policy, Travelers owed a duty to Avondale to defend it in the private damage actions instituted in Louisiana. The law in this area is well-settled. An insurer's duty to defend and to indemnify are separate and distinct, and the former duty is broader than the latter. *See Technicon*, 74 NY2d at 73; *Servidone*, 64 NY2d at 424; *Seaboard*, 64 NY2d at 310. The duty to defend rests solely on whether the complaint in the underlying action contains any allegations that arguably or potentially bring the action within the protection purchased. *Technicon*, 74 NY2d at 73. So long as the claims alleged against the insured rationally may be said to fall within the policy coverage, the insurer must come forward and defend. *Id.*

New York courts have held, in addition, that an insurer seeking to avoid its duty to defend bears a heavy burden. "[B]efore an insurance company is permitted to avoid policy coverage, it must . . . establish[ ] that the exclusions or exemptions apply in the par-

ticular case, and that they are subject to no other reasonable interpretation." *Seaboard, 64 NY2d at 311; see also Neuwirth* v. *Blue Cross & Blue Shield,* 62 NY2d 718 (1984) (mem.) (citations omitted). To avoid the duty therefore the insurer must demonstrate that the allegations in the underlying complaints are "solely and entirely" within specific and unambiguous exclusions from the policy's coverage. *See International Paper,* 35 NY2d at 325.

Consequently, Travelers can be excused from its duty to defend only if it can be determined as a matter of law that there is no possible basis in law or fact upon which the insurer might be held to indemnify Avondale. *See, e.g., Villa Charlotte Bronte, Inc.* v. *Commercial Union Ins. Co.,* 64 NY2d 846, 848 (1985) (mem.). Comparison must be made *de novo* between the allegations contained in the complaint or underlying action and the terms of the policy. *See National Grange Mut. Ins. Co.* v. *Continental Casualty Ins. Co.,* 650 F. Supp. 1404, 1408 (S.D.N.Y. 1986); *Seaboard,* 64 NY2d at 310-11.

Travelers relies on the New York Court of Appeals' recent affirmance of the Appellate Division's decision in *Technicon* rejecting a duty to defend under an identical "pollution exclusion." There Technicon operated a plant that manufactured blood analyzing machines. It was sued by private parties for personal injuries suffered as a result of exposure to toxic chemicals allegedly discharged by it into a stream. Technicon brought a declaratory judgment action in New York to compel its insurers to undertake their contractual duty to defend. Defendants asserted that a clause in their respective policies excluding losses relating to the discharge of pollutants unless such discharge is "sudden and accidental" relieved them of that duty. *Technicon,* 141 AD2d at 128. Defendants argued that Technicon's answer in the underlying action had admitted that it had intentionally discharged toxins into the creek for some six years, and therefore that the pollution exclusion—and not the "sudden and accidental" exception to the

exclusion—applied. This admission, defendants argued, made it clear that the polluting was neither sudden nor accidental.

The Appellate Division held that, on the facts alleged in the pleadings of the underlying action, defendants had no duty to defend, and that the pollution exclusion exempted from coverage "liability based on *all* intentional discharges of waste materials." *Id.* at 139. It explicitly distinguished those cases in which the discharges alleged in the underlying complaint were in fact unintentional.

In affirming the Appellate Division, New York's highest court stated that as a matter of law the conduct complained of was not an accidental occurrence under the policy because Technicon conceded that it intentionally discharged toxic wastes from its blood sampling equipment into a creek. *Technicon*, 74 NY2d at 75.

In the instant case the district court distinguished the Appellate Division holding in *Technicon*. *See* 697 F. Supp. at 1317 n.4. It noted that the eight underlying complaints filed against, *inter alia*, Avondale alleged only that the site operator operated the site from 1960 to 1982; that waste products were disposed of there; and that the site contains hazardous waste, which the complaints asserted had caused and will continue to cause injury to person and property. *Id.* at 1317. In distinguishing the present case from *Technicon*, Judge Conboy noted that the complaint did not allege how the discharge escaped, nor what Avondale did to contribute to the seepage. There was no allegation that Avondale itself continuously and intentionally polluted. *Id.* at 1317.

Examining the allegations of the underlying Louisiana complaints it appears that Avondale is one of 70 named defendants. The allegations charge all the defendants with "insufficient" containment measures; with "generating" hazardous waste; with "knowledge" of the presence of toxins; with culpability for "es-

cape" of hazardous materials. None of these conclusory assertions "clearly negate" the possibility that discharge or escape was "sudden and accidental." Hence, it seems plain that the New York Court of Appeals' affirmance of *Technicon* did nothing to cast doubt on the district court's conclusion. Travelers therefore has a duty to defend the private actions.

## III. Travelers' Duty to Defend the Administrative Proceeding

Travelers' policy requires it to defend "any *suit* against the insured seeking *damages* on account of bodily injury or property damage." (emphasis supplied). Whether the administrative proceeding is a suit and whether the remedial costs expended by the State of Louisiana that potentially may be assessed against Avondale are damages—within the meaning of the policy—are the remaining questions that we must answer. Appellant Travelers and amicus American Motorists Insurance Company (AMICO) argue that the proceeding is not a "suit" as the term is commonly understood under an insurance policy, and that costs are not damages. The district court came to a contrary conclusion. *See* 697 F. Supp. at 1318-20 (damages), 1320-23 (suit).

### A. Suit

We have little trouble viewing this administrative proceeding as a suit. The demand letter commences a formal proceeding against Avondale, advising it that a public authority has assumed an adversarial posture toward it, and that disregard of the DEQ's demands may result in the loss of substantial rights by Avondale. These strike us as the hallmarks of litigation, and are sufficiently adversarial to constitute a suit under New York law and within the meaning of the policy.

New York appears to have adopted a broad construction of the word "suit." Before arbitration was included within the meaning of suit by the insurance industry, New York's highest court held that suit included arbitration, reasoning that the in-

surer was aware that arbitration might be directed when it wrote the policy. *See Madawick Contracting Co.* v. *Travelers Ins. Co.*, 307 N.Y. 111, 119 (1954). Plainly, Travelers as an insurer was aware of the possibility of a suit regarding toxic chemicals as shown by the pollution exclusion clause it included in the policy it drafted.

Although the Appellate Division in *Technicon* held that the EPA administrative letter demand in that case was not a suit, 141 AD2d at 145-46, the Court of Appeals did not reach or decide the issue. 74 NY2d at 76. Again, *Technicon* is distinguishable on this issue too. There, in the appellate Division's own words, "[t]he EPA letter . . . merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action . . . ." 141 AD2d at 146. A request to participate voluntarily in remedial measures is not the same as the adversarial posture assumed in the coercive demand letter that Avondale received in the instant case.

Further, common sense argues that for Travelers to proffer a defense now is better for it, Avondale, and the public interest in a prompt cleanup of the hazardous waste. A judicial proceeding—were Avondale to ignore the DEQ letter—plainly will sharply escalate the liability costs Avondale faces. Fundamental issues involved in the administrative proceeding will obviously affect the extent of contribution of the various generators of the waste. A 1987 Report of the Association of State Waste Management Officials found in the record indicates—consonant with what experience teaches—that a private remedial effort is quicker and less expensive than a government sponsored program. *See Developments—Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1505 (1986).

**B. Damages**

Having concluded that the administrative proceeding is a suit, we turn next to damages. In New York, the terms of an insurance policy have long been accorded "a natural and reasonable meaning," *Doyle* v. *Allstate Ins. Co.*, 1 NY2d 439, 443 (1956), corresponding to "the reasonable expectation and purpose of the ordinary businessman." *Ace Wire & Cable Co.* v. *Aetna Casualty & Sur. Co.*, 60 NY2d 390, 398 (1983); *see Bird* v. *St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51 (1918). If there is uncertainty concerning its meaning, a policy is construed to embrace coverage. *Insurance Co. of No. Am.* v. *Dayton Tool & Die Works Inc.*, 57 NY2d 489, 499 (1982); *Thomas J. Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 NY2d 356, 361 (1974); *accord National Grange*, 650 F. Supp. at 1408. When an insurer that drafts the instrument wants to exclude from coverage policy obligations it would otherwise assume, it must do so in clear and unmistakable language. *See Seaboard*, 64 NY2d at 311.

Travelers and amici strenuously urge that damages has a precise meaning related only to remedies at law, and thus precludes a duty to defend actions that sound in equity or propose only equitable relief. In particular, they cite two cases, *Continental Ins. Cos.* v. *Northeastern Pharmaceutical & Chem. Co.*, 842 F. 2d 977 (8th Cir.) (en banc), *cert. denied*, 109 S. Ct. 66 (1988) (*NEPACCO*), and *Maryland Casualty Co.* v. *Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988). Both hold that, under Missouri and Maryland law respectively, the term damages does not include equitable relief—even when such is monetary—associated with a cleanup of a waste site under CERCLA. *NEPACCO*, 842 F.2d at 985-87; *Armco, Inc.*, 822 F.2d at 1352-54. They further argue that the Louisiana statute under which the DEQ demand was issued only permits the State to recover remedial and restorative expenses, relief that is equitable in nature. They assert therefore that the district court incorrectly held that the statute permitted the State to seek money damages

in lieu of equitable relief. Travelers and amici conclude that under New York law remedial costs for the cleanup of a waste site do not constitute damages. We disagree.

Here the term damages is not defined in Travelers' policy. Damages not being given any more limited definition in the policy must be construed to include the remedial costs that may be imposed on Avondale by the State of Louisiana. Damages, as the district court said, may "include funds necessary for restoration of third parties' properties." 697 F. Supp. at 1319. In addition, a number of other courts have held that cleanup costs are damages under the same kind of policy. *See, e.g., Port of Portland* v. *Water Quality Ins. Syndicate,* 796 F. 2d 1188, 1194 (9th Cir. 1986) (policy covers equitable cleanup costs when interpreted according to usual meaning); *American Motorists Ins. Co.* v. *Levelor Lorentzen, Inc.*, No. 88-1994, slip op. at 7 (D.N.J. Oct. 14, 1988) (same result under New York law), *appeal dismissed,* 879 F.2d 1165 (3d Cir. 1989); *accord United States Fidelity & Guar. Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988); *Dayton Indep. School Dist.* v. *National Gypsum Co.*, 682 F. Supp. 1403, 1411 n. 24 (E.D. Tex 1988); *Centennial Insur. Co.* v. *Lumbermens Mut. Casualty Co.*, 677 F. Supp. 342, 349-50 (E.D. Pa. 1987).

We believe therefore that inasmuch as appellee might be held liable for cleanup costs, appellant was obliged to defend. Moreover, viewed from the insured's perspective, we think an ordinary businessman reading this policy would have believed himself covered for the demands and potential damage claims now being asserted in the DEQ administrative proceeding, *see Allstate Ins. Co.* v. *Klock Oil Co.*, 73 AD2d 486, 489 (4th Dept. 1980), particularly absent any specific exclusionary language in the policy.

### C. Indemnification

Travelers has also raised the question of indemnification or contribution from other insurers arguing that it is an excess car-

rier with respect to at least two other insurers. The district court did not rule on this issue, only requiring Travelers to defend. As Avondale had the clear right to choose which insurance company it would name as a defendant, regardless of whatever rights Travelers may have to demand defense costs from the other carriers, we need not and do not on this appeal adjudicate Travelers' rights against the third-party defendants.

## CONCLUSION

For all the reasons stated above, the judgment appealed from is affirmed.

**MEMORANDUM OPINION AND JUDGMENT**
**December 6, 1988**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**
**86 Civ. 9626 (KC)**

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AVONDALE INDUSTRIES, INC. and
OGDEN CORPORATION
*Plaintiffs,*

*-against-*

THE TRAVELERS INDEMNITY COMPANY,
*Defendant.*

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THE TRAVELERS INDEMNITY COMPANY,
*Third-Party Plaintiff,*

*-against-*

COMMERCIAL UNION INSURANCE COMPANY,
HIGHLANDS INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
and NATIONAL UNION FIRE INSURANCE COMPANY,
*Third-Party Defendants.*

(Reported at 123 F.R.D. 80)

KENNETH CONBOY, *District Judge*:

Plaintiff Avondale Industries, Inc. ("Avondale") and Ogden Corporation ("Ogden") have moved for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on this Court's Memorandum Opinion and Order, dated October 19, 1988. This Court concluded that defendant Travelers Indemnity Company ("Travelers") is obligated to defend the Plaintiffs in both the private actions filed and the administrative

process initiated by the Louisiana Department of Environmental Quality ("DEQ") and granted partial summary judgment in favor of the Plaintiffs.

## DISCUSSION

Rule 54(b) of the Federal Rules of Civil Procedure provides as follows:

> "When more than one claim for relief is presented in [sic] action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The rule is designed to allow the district court to depart from the usual principle that a final judgment is not entered prior to the complete adjudication of all the claims of all the parties so that the Court can provide relief where it is needed to avoid undue hardship to the parties. *Cullen* v. *Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 3266 (1987). Accordingly, the court may direct entry of a partial final judgment either (1) disposing of claims of or against fewer than all of the parties or (2) disposing of fewer than all of the claims. The Court, however, must remain cognizant of the goals of judicial economy and the policy against "piecemeal appeals." *See United States* v. *McDonald*, 435 U.S. 850, 852 (1977); *Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956).

When multiple claims are involved, a court should not enter final judgment dismissing a given claim unless that claim is "separable from the claims that survive." *Cullen*, 811 F.2d at 711. Claims are customarily regarded as "separable" if they embrace "at least some different questions of fact and law and could be separately enforced or if 'different sorts of relief' are sought." *Id.*

(citations omitted); *see* 10 Wright, Miller, & Kane, *Federal Practice & Procedure*, section 2657, at 67 (1983) (claims are separable when there is more than one possible recovery and the recoveries are not mutually exclusive). Claims may be considered "separable" when these attributes exist, *even if they have arisen out of the same transaction or occurrence. Id.* (emphasis added); *see Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 452 (1956); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 436-37 & n. 9 (1956).

In the instant multi-claim case, the question is whether the duty to defend is separable from the duty to indemnify. Under New York law, "it is crystal clear that [Travelers'] duty to defend is *separate and distinct* from [its] duty to indemnity." *National Grange Mut. Ins. Co.* v. *Continental Cas. Ins. Co.*, 650 F. Supp. 1404, 1407 (S.D.N.Y. 1986) (emphasis added); *Servidone Constr. Co.* v. *Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 423-24, 477 N.E. 2d 441, 444-45, 488 N.Y.S.2d 139, 142 (1985); *see Seaboard Surety Co.* v. *Gillette Co.*, 64 N.Y.2d 304, 310, 476 N.E.2d 272, 274, 486 N.Y.S.2d 873, 875-76 (1984); *Int'l Paper Co.* v. *Continental Cas. Co.*, 35 N.Y.2d 322, 326, 320 N.E.2d 619, 621, 361 N.Y.S.2d 873, 876 (1974). The duty to defend is "heavier and broader" than the duty to indemnify. *See Servidone*, 64 N.Y.2d at 423-24, 477 N.E.2d at 444-45, 488 N.Y.S.2d at 142. The obligation to defend has been termed "litigation insurance" as an insurer is required to provide a defense to any action within the policy coverage, however groundless, in which the insured may possibly be held liable for damages. *See National Grange*, 650 F. Supp. at 1407-08. Furthermore, "the duty to defend is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions." *See Seaboard Surety*, 64 N.Y.2d at 310, 476 N.E.2d at 274, 486 N.Y.S.2d at 875-76. Therefore, it follows that the first part of the Rule 54(b) analysis is satisfied as

it is undeniably clear that Travelers' duty to defend is distinct from its duty to indemnify even though the two obligations arise out of the same transaction or occurrence. Consequently, the fact that the indemnity issue has not yet been settled is not dispositive as Travelers suggests.

The second part of the rule permits this Court to direct that partial final judgment be entered if it concludes that "there is no just reason for delay." Fed. R. Civ. P. 54(b). This determination is committed to the sound discretion of the district court. *Cullen*, 811 F.2d at 711. Travelers, in opposing the entry of partial final judgment, states that this Court should postpone such entry as *Technicon Electronics Corp.* v. *The American Home Assurance Co.*, No. 953E, slip op. (2d Dep't Oct. 3, 1988), which this Court distinguished in its October 19, 1988 Order, is "awaiting appeal to the New York Court of Appeals." (Travelers Memorandum of Law at 7). Travelers also argues that a final judgment enforcing its duty to defend will somehow prejudice its rights against the third-party defendants. (*Id.* at 6). Finally, Travelers contends that Avondale will not suffer prejudice if the Court does not certify the Order.

First, Travelers does not in any way demonstrate that *Technicon* is indeed "awaiting appeal." In addition, this Court does not see any reason why Avondale should have to wait until some indefinite future date to receive the defense to which it is entitled. The private actions and the administrative process initiated by the Louisiana DEQ against Plaintiffs require immediate attention. Plaintiffs should not have to bear either the sizable expense or the burden of decision-making as it pertains to defense strategy alone.

As regards Travelers' claim that its rights against third-party defendants will be prejudiced if this Court directs entry of final judgment, to the extent that Travelers has asserted its rights this Court has determined that its argument is without merit. *See*

Memorandum Opinion and Order, October 19, 1988, at 20-21. To the extent that Travelers has not yet asserted its rights, if any, the Court fails to see why plaintiffs should be prejudiced by such delay.

Travelers' final argument in opposition is that Plaintiff Avondale will suffer no prejudice if a final judgment is not entered. This argument is based on the allegation that Avondale's former corporate parent, Ogden, is paying for Avondale's defense and will continue to do so until September 30, 1993. Regardless of whether Ogden may or may not be paying for the defense, this Court has determined that it is Travelers' obligation to defend Avondale. Travelers' argument simply begs the question of its own obligations. As stated above, the duty to defend includes the payment of expenses as well as taking on the burden of decision-making regarding litigation strategy.

It is axiomatic that effective management of litigation in a multi-front liability war such as plaintiffs here confront, is complex and daunting. A case of this type goes through mutations, sometimes daily. To suggest that the passage of time matters not to the plaintiffs in such circumstances, and that enforcement of the duty to defend can await another day, denigrates the professional obligation here found to have been undertaken. Moreover, should this Court relegate the plaintiffs to an undetermined period of watchful waiting for final judgment on its Order, it is conceivable that Travelers might take issue with and disclaim responsibility for any litigation decisions made by Plaintiffs in the interim. Furthermore, it is not inconceivable that disputes might later arise as to expenses Plaintiffs actually incurred in their defense, and the extent to which such expenses were later recoverable from Travelers.

In addition, entry of final judgment will not prejudice Travelers. Rather, such entry will actually benefit Travelers, since it could then seek appeal of this Court's Order. In the event that

Travelers chose not to appeal, the litigation would be advanced as Travelers would become directly involved immediately in the defense of the underlying actions.

Travelers suggests that if it chooses to appeal, there remains the remote possibility that there could be two appeals with respect to the various insurers' obligations, since, Travelers states, this Court will be called upon to determine the obligations of the third-party defendant insurers, and that it is likely that such a determination would be appealed. However, this Court believes that there is no immediate prospect of an Order being entered as to Travelers' rights (if any) against third parties, and certainly, that any appeal of such an Order is at this time entirely speculative.

In light of the pending actions against Plaintiffs and the aggressive manner in which both parties petitioned this Court for determination of Travelers' obligation to provide a defense for Plaintiffs, *and in view of the immensely important public policy questions relating to environmental hazard and safety in Louisiana and elsewhere that are fundamentally effected by liability, defense and indemnification findings in actions like this*, this Court concludes that there is no just reason for delay and directs the entry of partial final judgment upon its Opinion and Order of October 19, 1988.

SO ORDERED

KENNETH CONBOY
United States District Judge

Dated: New York, New York
December 6, 1988

**MEMORANDUM OPINION AND ORDER**
**October 19, 1988**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**
**86 Civ. 9626 (KC)**

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AVONDALE INDUSTRIES, INC. and
OGDEN CORPORATION,
*Plaintiffs,*

*v.*

THE TRAVELERS INDEMNITY COMPANY,
*Defendant.*

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THE TRAVELERS INDEMNITY COMPANY,
*Third-Party Plaintiff,*

*v.*

COMMERCIAL UNION INSURANCE COMPANY,
HIGHLANDS INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
and NATIONAL UNION FIRE INSURANCE COMPANY,
*Third-Party Defendants.*

(Reported at 697 F. Supp. 1314)

KENNETH CONBOY, *District Judge:*

Plaintiffs brought the instant action for a declaratory judgment, pursuant to 28 U.S.C. section 2201 (1982), that the defendant is obligated to defend and indemnify plaintiffs under

comprehensive general liability ("CGL") insurance policies issued by defendant to plaintiffs,[1] covering the period 1975-1984. *See* Complaint para. 6. Plaintiff Avondale currently is a defendant in at least fourteen private damage actions in Louisiana stemming from third parties' allegedly tortious operation of a hazardous or toxic waste disposal or storage site (the "site") in that state. Avondale is involved because it contracted with one of the operators of the site to sell the operator, during the period December 1975 to October 1979, "salvage oil," defined as "oil, residual fuel, cargo and other materials." *See* Affidavit of R. Dean Church, executed Oct. 5, 1987, at paras. 4, 6. The private damage actions allege that Avondale's salvage oil contributed in an unspecified manner to the creation of the pollution at the site.

Avondale also seeks defense and indemnification for actions being taken by the Louisiana Department of Environmental Quality ("DEQ") to clean up the site. *See* Complaint Ex. B.

Jurisdiction is predicated on diversity of citizenship between plaintiffs, Delaware corporations having their principal places of business in Massachusetts (Avondale) and New York (Ogden), and defendant, a Connecticut corporation having its principal place of business in Connecticut. *See* 28 U.S.C. § 1332(a)(1) (1982). The action is before the court on plaintiffs' motion for partial summary judgment, pursuant to Fed. R. Civ. P. 56(a), that defendant is obligated to defend them in both the private actions and the process initiated by the State of Louisiana.

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[1] Plaintiff Ogden Corporation is listed as named insured. *See, e.g.*, Complaint Ex. A. However, "[n]amed insured" includes Ogden's subsidiaries. *See id.* § IV(I). Plaintiff Avondale Industries, Inc. is a successor to a subsidiary of Ogden Corporation named Avondale Shipyards, Inc. *See* Affidavit of R. Dean Church, executed Oct. 5, 1987, at para. 2. Avondale Shipyards, Inc. existed during the time period relevant to the underlying actions, and in fact is the company that dealt with one of the owners of the waste site found to be polluted.

## LEGAL ANALYSIS

The court applies New York law to the contracts between plaintiffs and defendant.[2] "[T]he duty of the insurer to defend the insured[s] rests solely on whether the complaint[s] [against the insureds] allege[ ] *any facts or grounds* which bring the action[s] within the protection purchased." *Seaboard Surety Co.*v. *Gillette Co.*, 64 N.Y.2d 304, 310 476 N.E.2d 272, 275, 486 N.Y.S.2d 873, 876 (1984) (emphasis added); *see National Grange Mutual Ins. Co.* v. *Continental Casualty Ins. Co.*, 650 F. Supp. 1404, 1408 (S.D.N.Y. 1986) ("Even if some of the allegations of the underlying complaint are clearly outside the scope of the coverage contained in the policy, the insurer is obligated to defend unless the allegations as a whole preclude coverage."); *Utica Mutual Ins. Co.* v. *Cherry*, 38 N.Y.2d 735, 736-37, 343 N.E.2d 758, 758, 381 N.Y.S.2d 40, 40 (1975) (mem.) (insurer's duty to defend triggered where underlying complaint asserts alternative grounds for relief, and only some of those grounds are within the policy's coverage), *aff'g* 45 A.D.2d 350, 353, 358 N.Y.S.2d 519, 522 (2d Dep't 1974). "The duty to defend arises not from the probability of recovery but from its possibility, no matter how remote. Any doubt as to whether the allegations state a claim covered by the policy must be resolved in favor of the insured as against the insurer." *George Muhlstock & Co.* v. *American Home Assurance Co.*, 117 A.D.2d 117, 122, 502 N.Y.S.2d 174, 178 (1st Dep't 1986).

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2 Some of the third-party defendants to the action, who are not parties to this motion, urge that the court make no choice of law determination at this time. They submit that they will argue at the appropriate time that their contracts of insurance with the plaintiffs are governed by Louisiana law. Assuming that a true conflict of laws exists, the court stresses that it has not determined what law should apply to those other contracts. Indeed, it may be constitutionally impermissible to apply New York law to those other contracts. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 820-22 (1985) (in nationwide class action concerning leases, application of forum law to claims over which forum had developed no state interests, when forum law conflicted with that of interested states, was "sufficiently arbitrary and unfair as to exceed constitutional limits").

**A. The Private Lawsuits**

The eight underlying complaints provided to the court, *see* Complaint Ex. C-G; Plaintiffs' Motion For Partial Summary Judgment Ex. L-N,[3] allege, in substance, the following relevant facts: the site operator operated the site from the 1960s until at least 1982; Avondale was one of many companies whose waste products were disposed of at the site; and, the site contains hazardous or toxic waste. Significantly, there are no allegations as to how the waste escaped or seeped, nor as to Avondale's culpable actions that contributed to the occurrence. While Avondale may have continuously generated these waste products, it does not follow necessarily, and the private actions certainly have not alleged, that Avondale continuously, by its own actions or through the actions of an agent, intentionally polluted.[4] All of Avondale's products may have been properly stored, and escaped in a single incident. This is a factual matter that will be determined at the trial(s) of the underlying actions.

For purposes of this motion only, the court assumes that defendant's offered construction of the meaning of the word "sudden" in plaintiffs' policies is correct. *See American Motorists Ins. Co.* v. *General Host Corp.*, 667 F. Supp. 1423, 1428 (D. Kan. 1987) ("Even if 'sudden' is not limited to an instantaneous happening, it still must be on brief notice, and must be unexpected. No use of the word 'sudden' or 'suddenly' could be consistent with an event which happened gradually or over an extended time, nor could it be consistent with an event which was anticipated or predict-

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3 The court has been informed that six additional private lawsuits have been filed. *See* Letter from Hugh N. Fryer to Hon. Kenneth Conboy (Oct. 14, 1988).

4 The absence of any such allegation distinguishes this action from *EAD Metallurgical, Inc.* v. *Aetna Casualty & Surety Co.*, No. CIV-86-1027E, slip op. (W.D.N.Y. July 12, 1988), in which the insured allegedly directly polluted. *See id.*, slip op. at 1. Also distinguishable is *Technicon Electronics Corporation* v. *American Home Assurance Company*, __ A.D.2d__, No. 953E, slip op. (N.Y. 2d Dep't Oct. 3, 1988), in which the insured conceded that it had intentionally discharged industrial wastes. *See id.*, slip op. at 3.

able."). *Contra Broadwell Realty Servs.* v. *Fidelity & Casualty Co.*, 218 N.J. Super. 516,__, 528 A.2d 76, 83-86 (App. Div. 1987) (rejecting argument that "sudden" has a temporal meaning, and holding that it means only "unexpected and unintended"). Even under this more restrictive view, there is a question of fact whether the dispersal of Avondale's waste product comes within the policies. *See* discussion *supra* at 4-5.

The existence of factual disputes, material to the issue of indemnification, in the underlying private lawsuits requires the court to hold that as a matter of law, the defendant has failed to demonstrate "that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify [the insureds] under any provision contained in the polic[ies]." *Villa Charlotte Bronte, Inc.*v. *Commercial Union Ins. Co.*, 64 N.Y.2d 846, 848, 476 N.E.2d 640, 641, 487 N.Y.S.2d 314, 315 (1985) (mem.). The defendant's assertion that Avondale was an active, continuous polluter is a conclusion that is not established on the underlying pleadings. The matter outside the pleadings submitted by the defendant is irrelevant to the determination of its duty to defend; such matter is relevant only to its duty to indemnify.

The defendant argues that summary judgment is inappropriate because there is an extant factual dispute as to the parties' intent in drafting the pollution exclusion clause to the insurance contracts, citing *Olin Corporation* v. *Insurance Company of North America*, 603 F. Supp. 445 (S.D.N.Y. 1985), and *County of Broome* v. *Aetna Casualty & Surety Company*, slip op. (N.Y. Sup. Ct. June 24, 1988). Each of those cases denied motions for partial summary judgment because a factual question existed whether the insurer was obligated under the policy to indemnify the insured. *See Olin Corp.*, 603 F. Supp. at 448-49; *County of Broome*, slip op. at 11. However, the Circuit Court of Appeals for the District of Columbia has held that the holdings of *Olin Corporation* and *County of Broome* are "simply inconsistent with New York law." *Abex Corp.* v. *Maryland Casualty Co.*, 790 F.2d 119, 129 n.44 (D.C.

Cir. 1986) (applying New York law) (discussing *Olin Corp.*); *see, e.g., Villa Charlotte Bronte, Inc.*, discussed *supra* at 6. The court declines to follow *Olin Corporation* and *County of Broome.* "Only disputes over facts that might affect the outcome of the suit under the governing [substantive] law will properly preclude the entry of summary judgment." *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 248 (1986). "[W]hether the parties intended Travelers [sic] policies to provide limited pollution coverage for sudden, accidental primary discharges of pollutants or some broader insuring obligation that extends to Avondale's continuous waste disposal activity," *see* Defendant's Memorandum of Law in Opposition, at 39, is immaterial to resolving the question of the defendant's duty to provide the plaintiffs with a defense, because the underlying complaints are so ambiguous that a claim within the purchased coverage is alleged under the more restrictive interpretation.

The court concludes that the defendant is obligated to provide a defense for the plaintiffs in the private lawsuits.

**B. The Department of Environmental Quality Demand**

The policies of insurance contain the standard section on liability, including the following relevant language: "[T]he [insurer] shall have the right and duty to defend any suit against the insured seeking damages [because of bodily injury or property damage] on account of such injury or damage." The defendant raises two objections to plaintiffs' request that it defend them with respect to the administrative process begun by the Louisiana Department of Environmental Quality to clean up the site. First, the defendant claims that cleanup costs are not "damages," so that the policies provide no coverage. Second, the defendant argues that the administrative process is not a "suit" that it is required to defend.

**1. Whether the proceeding by the Louisiana DEQ raises any claim coming within the policies' coverage as damages**

The cases are split on the question whether waste site cleanup costs constitute "damages" under CGL policies, or whether such costs are "restitutional," and therefore not covered. *Compare United States Fidelity & Guaranty Co.* v. *Thomas Solvent Co.*, 683 F. Supp. 1139, 1163-65, 1168-71 (W.D. Mich. 1988) (applying Illinois law) ("While . . . claims [for cleanup costs] might be characterized as seeking 'equitable relief,' the cleanup costs are essentially compensatory damages for injury to common property and for that reason the insurer has a duty to defend."), *vacated on other grounds, id.* at 1174-77 (W.D. Mich. 1988) *and New Castle County* v. *Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359, 1362, 1364-1366 (D. Del. 1987) (applying Delaware law) ("an ordinary definition of the word 'damages' makes no distinction between actions at law and actions in equity") *and Broadwell Realty Servs.*, 218 N.J. Super. at __, 528 A.2d at 81-83 (recognizing "that the cost of complying with an injunctive decree does not ordinarily fall within" the definition of "damages," yet holding that certain cleanup expenses are covered by CGL policy) *with Continental Ins. Cos.* v. *Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 978, 984-87 (8th Cir.) (en banc) (applying Missouri law) (5-3 majority holding that cleanup costs are in the nature of equitable relief, and therefore "are not claims for 'damages' under . . . CGL policies"), *petition for cert. filed*, 56 U.S.L.W. 3850 (U.S. May 27, 1988); *Maryland Casualty Co.* v. *Armco, Inc.*,822 F.2d 1348, 1351-54 (4th Cir. 1987) (applying Maryland law) ("damages" has a "legal, technical meaning" which excludes "the costs . . . of complying with the directives of a regulatory agency"), *cert. denied*, __ U.S. __, 108 S. Ct. 703 (1988). New York trial courts have split in the same manner. *Compare Kutsher's Country Club Corp.* v. *Lincoln Ins. Co.*, 119 Misc. 2d 889, 889-93, 465 N.Y.S.2d 136, 137-39 (Sup. Ct. 1983) (cleanup costs

constitutes "property damage" within CGL policy) *with County of Broome*, slip op. at 20-21 (costs involved in "remedial program" are not covered by CGL policy). The Second Department did not address the issue in its decision in *Technicon Electronics Corporation*. *See* ___ A.D.2d at __ , slip op. at 18-19.

In New York, the terms of an insurance policy are to be accorded "a natural and reasonable meaning." *Doyle* v. *Allstate Ins. Co.*, 1 N.Y.2d 439, 443, 136 N.E.2d 484, 487, 154 N.Y.S.2d 10, 13 (1956). Moreover, the terms are construed according to "the reasonable expectation and purpose of the ordinary businessman." *Ace Wire & Cable Co.* v. *Aetna Casualty & Surety Co.*, 60 N.Y.2d 390, 398, 457 N.E.2d 761, 764, 469 N.Y.S.2d 655, 658 (1983); *see Bird* v. *St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 87 (1918).

In light of the foregoing precedent from the New York Court of Appeals, the court concludes that that court would find that cleanup costs do come within the CGL's coverage as "damages." As a general matter, such costs may extend to include funds necessary for restoration of third parties' properties. *See, e.g., Broadwell Realty Servs.*, 218 N.J. Super. at ____, 528 A.2d at 82-83 (differentiating between expenditures for prevention of damage to other parties' properties and expenditures for damage to insured's property). Specifically, the relevant Louisiana statute speaks of liability for a "pollution source," La. Rev. Stat. Ann. § 30:1149.46(A) (West Supp. 1988), which "means the site or location of a discharge or potential discharge, *including such surrounding property necessary to secure or quarantine the area." Id.* § 30:1133(10) (West Supp. 1988) (emphasis added); *see id.* § 30:1149.42(8) (West Supp. 1988) (referring to the definition in section 30:1133). The court expects that Louisiana's DEQ would require parties to contribute towards the cleanup of others' properties, if they constitute part of a "pollution source."

The average businessman does not differentiate between "damages" and "restitution;" in either case, money comes from his pocket and goes to third parties. *See United States Fidelity & Guaranty Co.*, 683 F. Supp. at 1168 ("the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties"). The average businessman would consider himself covered for cleanup expenditures applicable to others' properties. Cases such as *Armco Inc.*, which apply a "legal, technical meaning" to the word "damages," *see id.* at 1352, are inapposite to this case, to which New York law, mandating construction according to "the reasonable expectation and purpose of the ordinary businessman," applies.

The court notes that New York cases have held that cleanup costs for real property are properly recoverable as a form of "damages." *See Jenkins* v. *Etlinger*, 55 N.Y.2d 35, 38-40, 432 N.E.2d 589, 590-91, 447 N.Y.S.2d 696, 697-98 (1982) ("the proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration"); *Seifert* v. *Sound Beach Property Owners Ass'n*, 60 Misc. 2d 300, 305, 303 N.Y.S.2d 85, 90 (Sup. Ct. 1969) (work undertaken to restore property to its prior condition "is a proper element of damage"); *Mullen* v. *Jacobs*, 58 Misc. 2d 64, 67-68, 71-72 294 N.Y.S.2d 636, 640, 643-44 (Sup. Ct. 1968) (expense incurred in removing debris from real property is a proper element of damages recoverable from tort-feasor). While these cases did not attempt to differentiate "damages" from "restitution," and did not concern insurance coverage for pollution cleanup, nevertheless they support the conclusion that the reasonable businessman would consider himself covered for such expenditures. If courts employ such language, surely it is appropriate for a businessman to consider himself to be covered for these expenditures.

Alternatively, even assuming the New York Court of Appeals would hold that cleanup costs are entirely restitutionary, and therefore not covered, the defendant would still be obligated to provide the plaintiffs with a defense in the administrative proceeding (assuming that such proceeding is a "suit"). This is because the state of Louisiana could elect to recover damages rather than restitution, or because a Louisiana court might decide that damages are appropriate, rather than restoration. The statute certainly contemplates the possibility that the state might recover damages, *see* La. Rev. Stat. Ann. § 30:1149.42(9)(a)(xiii) (West Supp. 1988) (authorizing secretary of department of environmental quality to take any action, besides those otherwise enumerated, deemed "necessary to restore the site *or remove the hazardous substance*") (emphasis added), and Louisiana courts would likely recognize the general principle that in the discretion of the court compensatory damages may be awarded in lieu of equitable relief. *See Dyer & Moody, Inc.* v. *Dynamic Constructors, Inc.*, 357 So. 2d 615, 618-19 (La. Ct. App. 1st Cir. 1978) (trial court did not commit error in awarding money judgment as compensatory damages in lieu of mandatory injunction); *Freestate Indus. Dev. Co.* v. *T. & H., Inc.*, 188 So. 2d 746, 748 (La. Ct. App. 2d Cir. 1966) ("The jurisprudence has established the principle that in the discretion of the court compensatory damages may be awarded in lieu of injunctive relief."). Because the state of Louisiana possesses this option, the defendant is obligated under New York law to provide a defense.

In *Doyle* v. *Allstate Insurance Company*, the New York Court of Appeals held that an insurer was obligated to defend its insured against an action seeking injunctive relief only, because the possibility existed that a court of equity might "grant damages in addition to or as an incident of some other special equitable relief." 1 N.Y.2d at 441-44, 136 N.E.2d at 485-87, 154 N.Y.S.2d at 11-14. Thus, the defendant is obligated, as the possibility exists, even if unstated, and even if remote, that the plaintiffs might be

held responsible for damages to others' properties through the cleanup process.

**2. Whether the Administrative Process Constitutes a Suit**

There had been conflicting New York trial court precedents on the question whether an administrative process such as that initiated by the Louisiana DEQ is a "suit" which triggers the coverage of the CGL policy. *Compare Technicon Elec. Corp.* v. *American Home Assurance Co.*, No. 08811/85, slip op. at 1-2, 4-5 (N.Y. Sup. Ct. Feb. 18, 1986) (governmental cleanup proceeding is a "suit" requiring insurer to provide a defense) *with County of Broome*, slip op. at 20-21 (governmental cleanup proceeding is not a "suit" requiring insurer to provide a defense). However, *Technicon Electronics Corporation* was recently reversed by the Appellate Division, Second Department. *See Technicon Elec. Corp.* v. *American Home Assurance Co.*, __ A.D.2d __, No. 953E, slip op. at 18-20 (N.Y. 2d Dep't Oct. 3, 1988). The court did conclude, in dicta only, that such a proceeding is not a "suit" requiring a defense by the insurer.

The Second Department relied on three cases in making its determination—*Detrex Chemical Industries, Incorporated* v. *Employers Insurance*, 681 F. Supp. 438 (N.D. Ohio 1987), *City of Evart* v. *Home Insurance Company*, slip op. (Mich. Ct. App. Aug. 5, 1987), and *County of Broome* v. *Aetna Casualty Company*, slip op. (N.Y. Sup. Ct. June 24, 1988). The court held that the demand letter sent Technicon Electronics Corporation by the Environmental Protection Agency

> merely informed Technicon of its potential liability under [relevant federal law] and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action on Technicon's part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject comprehensive general liability policies.

*Technicon Elec. Corp.*, No. 953E, slip op. at 19-20.

Decisions rendered by lower state courts are not controlling on federal courts construing state law when, as here, the state's highest court has not ruled on the issue. *See Commissioner of Internal Revenue* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). Such decisions are "dat[a] for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" *Id.* (emphasis in original) (quoting *West* v. *A.T. & T. Co.*, 311 U.S. 223 (1940)).

None of the three cases cited by the Second Department is persuasive to this court. *County of Broome* turned on the determination that the governmental administrative process did not constitute a suit *for damages*, *see id.*, slip op. at 21, a conclusion at odds with the court's conclusion that cleanup costs are damages. *See* discussion *supra* at 8-13.

Critical to the court's decision in *Detrex Chemical Industries* was the equation of a governmental demand letter with other forms of "claims," to which the insurer is not obligated to provide a defense. *See* 681 F. Supp. at 442-46. The two cases cited by the court to make the general point are distinguishable from governmental demand letters in a crucial, and to this court determinative, fact. In both *Fisher* v. *Hartford*, 329 F.2d 352 (7th Cir. 1964) and *Marvel Heat Corp.* v. *Travelers Indemnity Co.*, 325 Mass. 682, 92 N.E.2d 233 (1950), there was nothing the party asserting the claim against the insured could do between the occurrence of the tort and the initiation of a lawsuit that would adversely affect the insured's rights, because the claims were for common law torts. *See Fisher*, 329 F.2d at 353 (personal injury); *Marvel Heat Corp.*, 325 Mass. at __, 92 N.E.2d at 233 (property damage). On the other hand, as the court in *Detrex Chemical Industries* acknowledged, the government has discretion in choosing responsive action in combatting pollution sites. *See* 681 F. Supp. at 446-47. By choos-

ing a more expensive option, the government can adversely affect the insured's rights.

Thus, the analogy drawn by the court in *Detrex Chemical Industries* is not apt. Adverse consequences can befall an insured during the administrative pollution cleanup process. The acting governmental agency could select a more expensive responsive action. Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510 (codified as amended at 42 U.S.C.A. §§ 9601-9675) (West 1983 & Supp. 1987), a party may at least challenge the selected response as being arbitrary or capricious. *See* 42 U.S.C.A. § 9613(j)(2) (West Supp. 1987). The Louisiana statute appears to offer defendants no such opportunity. *See* La. Rev. Stat. Ann. § 30:1149.46 (West Supp. 1988) ("Finding of liability by the court"); *id.* § 30:1147 (West Supp. 1988) ("Defenses"). Thus, the need to be represented is acute at the time the demand letter is received.

The court notes also that the district court in *Detrex Chemical Industries* reconsidered its original decision. *See* 681 F. Supp. at 459-60 (N.D. Ohio 1988). On reconsideration, the court held that the insurer's duty to defend would be triggered by the government's issuance of a remedial order. *See id.* at 460. This court believes that such a position "shuts the barn door after the horses have gotten out." The adverse consequence to the insured occurs when the government chooses a remedial plan more expensive than an otherwise acceptable plan. Thus, the need for representation is greatest before the remedial plan is formulated, when the government is accepting input from the responsible parties. *See, e.g.*, Complaint Ex. B at 2-3 (Letter from Louisiana Department of Justice to Avondale Shipyards Inc. demanding that the company submit a remedial plan of its own, and inviting the company to participate in a meeting designed to "coordinate the submission of a plan").

The third case relied on by the Second Department, *City of Evart*, "held that the requirement of a suit was 'clear and unambi-

guous' and that the duty to defend extended only to 'suits, not allegations, accusations or mere claims which have not been embodied in a suit.' " *Technicon Elec. Corp.*, No. 953E, slip op. at 19. *City of Evart* may be authority within Michigan, *but see Fireman's Fund Ins. Co.* v. *Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D.Mich. 1987) (relying on another Michigan precedent, *United States Aviex Co.* v. *Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (Mich. Ct. App. 1983), to hold "that a 'suit' includes any effort to impose on the policyholder a liability ultimately enforceable by a court"), but it is not binding in New York. Its precedential value is further eroded by its characterization of a demand letter as a "mere claim[ ]." As already stated, a recipient of a demand letter can be adversely affected by ignoring the letter. *See* discussion *supra* at 15-17. Lastly, there is precedent in New York for interpreting the term "suit" flexibly.

The plaintiffs submit the case of *Clarke* v. *Fidelity & Casualty Co.*, 55 Misc. 2d 327, 285 N.Y.S.2d 503 (Sup. Ct. 1967), for the proposition that, under New York law, once an insured has received notice of the institution of "juridical process" that might eventually lead to a judgment, a "suit" requiring the insurer to defend has been stated. Plaintiffs point out that the Louisiana statute expressly provides that the secretary of DEQ may institute a lawsuit to compel recovery of costs from any liable parties. *See* La. Rev. Stat. Ann. § 30:1149.45(B) (West Supp. 1988).

In *Clarke*, the insured was "vouched in" to a lawsuit. *See* 55 Misc. 2d at 333-35, 285 N.Y.S.2d at 508-10. This process notified the insured that another party, involved in a lawsuit, would have the insured be bound by judgment in that lawsuit without actually impleading the insured, and for that reason, the other party was offering the insured the opportunity to control the defense of the litigation. *See id.*, 285 N.Y.S.2d at 508-10. The court stated that use of the vouching-in process would not make the insured "any the less proceeded against by way of the juridical process generically defined in the insurance contract as a 'suit.' " *See id.* at 336,

285 N.Y.S.2d at 510. The court concluded that the procedure constituted a "litigious process which is in fact a 'suit' within the meaning of the" insurance policy. *See id.*, 285 N.Y.S.2d at 510; *see also Continental Casualty Co.* v. *Cole*, 809 F.2d 891, 897-99 (D.C. Cir. 1987) ("*Clarke* focused on the substance of the action against the insured rather than on its form, recognizing that an insured who is being 'proceeded against,' albeit in an unorthodox fashion, is no less entitled to a defense than his insured contemporaries who are legally attacked in a more conventional manner.").

There is a distinction between *Clarke* and the process involved in this action. The vouching-in procedure used in *Clarke* sufficed to give a judgment obtained in a lawsuit binding effect against the insured. *See* 55 Misc. 2d at 333-35, 285 N.Y.S.2d at 508-10. On the other hand, there was no pending judicial proceeding filed by the Louisiana DEQ against anyone at the time plaintiffs filed this declaratory judgment action. However, the plaintiffs had received a "demand letter" from the DEQ, requiring the submission of a remedial plan. *See* Complaint Ex. B.

The distinction is insignificant. The relevant statute authorizes the secretary to take remedial action before instituting suit, which he may then use to "recover[ ]" expenditures. *See* La. Rev. Stat. Ann. § 30:1149.45(C) (West Supp. 1988). Thus, action may be undertaken which binds the insured before suit is filed. Since damages may be determined before the parties arrive in court, the administrative process is part of a "litigious process" that triggers the obligation to defend. *See New Castle County*, 673 F. Supp. at 1366 (demand letter "legally obligated" insured to incur cleanup costs); *Ex-Cell-O Corp.*, 662 F. Supp. at 75 (demand letter constituted "an effort to impose on the policyholders a liability ultimately enforceable by a court"). The promise to defend would be partially illusory if the insured were provided with a defense only as to liability, and not as to damages.

From the foregoing discussion, it should be clear that it is misleading to characterize a demand letter such as we have in this

case as seeking "voluntary participation in remedial measures." *Technicon Elec. Corp.*, No. 953E, slip op. at 19-20. First, failure to respond can lead to adverse consequences. Second, the court has not found any authority holding that the governmental agency is bound to accept a recipient's volunteered plan. Thus, representation is necessary to convince the government to accept one remedial plan rather than another. For all of the foregoing reasons, the court opines that the New York Court of Appeals would hold that receipt of a demand letter from a governmental environmental agency in such particular circumstances as we have in this case is a "suit" requiring the insurer to defend.

**C. Defendant's Other Objections**

The defendant objects that it is not obligated to defend any proceeding against the plaintiffs unless and until coverage is found as a certainty, citing cases from New Jersey. *See Hartford Accident & Indemnity Co.* v. *Aetna Life & Casualty Ins. Co.*, 98 N.J. 18, __, 483 A.2d 402, 405-08 (1984) (per curiam); *Burd* v. *Sussex Mutual Ins. Co.*, 56 N.J. 383, __, 267 A.2d 7, 9-14 (1970). The New Jersey rule is that if the insurer disputes the obligation to indemnify, its obligation to defend is translated "into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay." *Burd*, 56 N.J. at __, 267 A.2d at 10, *quoted in Hartford Accident & Indemnity Co.*, 98 N.J. at __, 483 A.2d at 406. It is felt that this avoids placing the insurer's counsel in a conflict between insurer and insured. *See Hartford Accident & Indemnity Co.*, 98 N.J. at __, 483 A.2d at 407; *Burd*, 56 N.J. at __, 267 A.2d at 10-11.

This objection is not well-grounded. New York, while recognizing the concern of conflicted counsel, deals with the problem arising under such circumstances differently. "If any such conflict of interest arises, as it probably will, the selection of the attorneys to represent the assureds should be made by them rather than by the insurance company, which should remain liable for the payment of the reasonable value of the services of whatever

attorneys the assureds select." *Prashker* v. *United States Guarantee Co.*, 1 N.Y.2d 584, 593, 136 N.E.2d 871, 876, 154 N.Y.S.2d 910, 917 (1956); *see Utica Mutual Ins. Co.* v. *Cherry*, 45 A.D.2d 350, 355, 358 N.Y.S.2d 519, 524 (2d Dep't 1974) (noting that the problem recognized by *Burd* and other cases is disposed of in New York by the rule established in *Prashker), aff'd mem.*, 38 N.Y.2d 735, 343 N.E.2d 758, 381 N.Y.S.2d 40 (1975). Thus, in New York the obligation is to defend, even if the interests of insured and insurer conflict.

Lastly, the defendant argues that it is an excess insurer, and that other insurers are primary insurers for these actions. Thus, the defendant contends it is not obligated to provide the plaintiffs with a defense.

This objection is without merit. The CGL policies state that "if any insurer affording other insurance to the named insured[s] denies primary liability under its policy, [Travelers] will respond under this policy as though such other insurance were not available." *E.g.*, Ex. G to Affidavit of Robert P. Carroll, executed Oct. 28, 1987, at Condition 5. The third-party defendants, other insurers named by the defendant, have all denied primary liability. According to its contract, these denials obligate the defendant.

## CONCLUSION

The defendant is obligated to provide the plaintiffs a defense for both the private actions filed and the administrative process initiated by the Louisiana Department of Environmental Quality. Therefore, the plaintiffs' motion for partial summary judgment is granted in all respects.

**SO ORDERED.**

Dated: New York, New York
October 19, 1988

KENNETH CONBOY
United States District Judge

**Letterhead of**

**OFFICE OF THE CLERK**

**UNITED STATES COURT OF APPEALS**

**FOR THE THIRD CIRCUIT**

February 15, 1990

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RE: Jones Truck Lines v. Transport Insurance Co.
Nos. 89-1729/59

Dear Counsel:

The Court will certify to the Missouri Supreme Court a question regarding the interpretation of the term "damages" under Missouri law in the insurance contracts at issue. Counsel are directed to confer immediately to see if they can agree on the specific question as it should be submitted. If they cannot agree, then appellant will submit the proposed form of the question within 5 business days of this letter and appellee will sumit the proposed

form of the question within 10 business days of this letter.

Very truly yours,
SALLY MRVOS, Clerk

By:

Chief Deputy Clerk

MEF/af

cc: For Your Information Only:

Shelley A. Woods, Esquire
William H. Allen, Esquire
Francis P. Newell, Esquire
Thomas W. Brunner, Esquire